SUPREME COURT, U. S.

No. 797

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

AMERICAN COMMERCIAL LINES, INC., ET AL.,
Appellants,

v.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY AND THE PENNSYLVANIA RAILROAD COMPANY, ET AL.,
Appellees.

On Appeal from the United States District Court for the Western District of Kentucky

JURISDICTIONAL STATEMENT

T. RANDOLPH BUCK,
P. O. Box 13244
Houston, Texas 77019

ROBERT E. WEBB,
701 Kentucky Home Life Building
Louisville, Ky. 40202

J. RAYMOND CLARK,
La Roe, Winn & Moerman
743 Investment Building
Washington, D. C. 20005

HARRY C. AMES, JR.,
Ames, Hill & Ames
523 Transportation Building
Washington, D. C. 20006
Attorneys for Appellants.

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TABLE OF CONTENTS

	Page
OPINION BELOW	2
JURISDICTION	2
STATUTES INVOLVED	3
QUESTIONS PRESENTED	3
STATEMENT OF THE CASE	4
Proceedings Before The Commission	4
Proceedings Before The District Court	4
THE QUESTIONS PRESENTED ARE SUBSTANTIAL	7
A. The Commission's Interpretations Of Its Powers Under Section 15a(3)	7
B. The Basis For The Commission's Use Of Full Costs As The Measure Of Inherent Advantage.	12
CONCLUSION	14
APPENDIX A—Opinion of the District Court	App. 1
APPENDIX B—Judgment of the District Court	App. 22
APPENDIX C—Report and Order of the Interstate Commerce Commission, Division 2	App. 24
APPENDIX D—Report and Order of the Interstate Commerce Commission	App. 49
APPENDIX E—Statutes Involved	App. 70
I. National Transportation Policy	App. 70
II. Section 15a (3)	App. 70

CITATIONS

I.C.C. v. *New York, N. H. & H. R. Co.*, 372 U.S. 744 (1963)	2, 3, 7, 9, 10, 12, 13
Ingot Molds, Pa. to Steelton, Ky., 323 I.C.C. 758 & 326 I.C.C. 77 (1965)	3, 12

Page

Louisville and Nashville Railroad Company and the Pennsylvania Railroad Company v. *U.S. and I.C.C.*, 268 F. Supp. 71 (1967) 7

Mechling Barge Lines v. *U. S.*, 376 U.S. 375 (1964) 2

New Automobiles in Interstate Commerce, 259 I.C.C. 475 (1945) 9, 10

STATUTES

Interstate Commerce Act.

Section 15a (3), 49 U.S.C. Sec. 15a (3) 3

National Transportation Policy, 49 U.S.C. preceding Sec. 1 3

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JURISDICTIONAL STATEMENT

Appellants, American Commercial Lines, Inc., et al.,* appeal from a judgment of the United States District Court for the Western District of Kentucky which set aside an order of the Interstate Commerce Commission and remanded the matter to the Commission for further

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* The appellants are American Commercial Lines, Inc., Mississippi Valley Barge Line Company, Ohio River Company, Union Barge Line Corporation and Waterways Freight Bureau, by this document.

The appellees are the Louisville and Nashville Railroad Company, the Pennsylvania Railroad Company and forty-eight additional railroads that joined as plaintiffs in the lower court.

action not inconsistent with its opinion. Appellants submit this statement to show that this Court has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the three-judge District Court for the Western District of Kentucky, reported at 268 F.Supp. 71 (1967) (advance sheets), is reproduced here as Appendix A. The judgment of the district court is set forth as Appendix B hereto. The original report of the Interstate Commerce Commission, Division 2, is reported at 323 I.C.C. 758 and reproduced here as Appendix C. The final report and order of the Interstate Commerce Commission is reported at 326 I.C.C. 77 and reproduced here as Appendix D.

JURISDICTION

This action was brought by appellees pursuant to the provisions of 28 U.S.C. sections 1336, 2321-2325 to enjoin, annul and set aside an order of the Interstate Commerce Commission in Investigation and Suspension Docket No. 8038, *Ingot Molds, Pa., to Steelton, Ky.*, 326 I.C.C. 77 (1965). The judgment of the district court setting aside the order of the Interstate Commerce Commission and remanding the matter for reconsideration was filed May 15, 1967. Notice of appeal was filed by appellants herein in the United States District Court for the Western District of Kentucky on July 13, 1967. This Court has jurisdiction under 28 U.S.C. 1253 and 2101(b) to review the judgment of the District Court on direct appeal. *I.C.C.* v. *New York, N. H. & H. R. Co.*, 372 U.S. 744 (1963); *Mechling Barge Lines* v. *United States*, 376 U.S. 375 (1964).

STATUTES INVOLVED

The principal statutory provisions under consideration are: Section 15a(3) of the Interstate Commerce Act (49 U.S.C. Sec. 15a(3)) and the National Transportation Policy (49 U.S.C. preceding Section 1), both of which are set forth in Appendix E hereto.

QUESTIONS PRESENTED

The questions presented by this appeal arise from the opinion and judgment of the District Court which set aside and permanently enjoined the order of the Interstate Commerce Commission in *Ingot Molds, Pa., to Steelton, Ky.*, 326 I.C.C. 77, 323 I.C.C. 758, and remanded the matter to the Commission for action not inconsistent with the Court's opinion. The questions are:

1. Did the District Court err in holding that the Commission failed to state a rational basis and make adequate findings to support its conclusion that full costs of two competing modes must be compared to determine which mode has the inherent cost advantage within the meaning of the National Transportation Policy?

2. Did the District Court err in holding "that the Commission has failed to state a rational basis to support its selection of the 'fully distributed' costs of the barge-truck mode as the floor for reduced railroad rates"?

3. Did the District Court err in holding that the Commission's use of full cost to determine which mode possessed the inherent advantage is contrary to *Interstate Commerce Commission* v. *New York, N. H. & H. R.R. Co.*, 372 U.S. 744, 760-761 (1963)?

4. Did the District Court err in holding that the Commission misinterpreted and misapplied the Transportation Acts of 1940 and 1958 in comparing the

full costs of competing modes of transportation to measure inherent advantage?

5. Did the District Court err in holding that the Congress intended to restrict the power of the Commission, without discretion, to determine the lawfulness of competitive rates under Section 15a(3) of the Interstate Commerce Act to consideration of a single test—whether such rates are above out-of-pocket costs.

STATEMENT OF THE CASE

Appellants, American Commercial Lines, Inc., Mississippi Valley Barge Line Company, Ohio River Company, and Union Barge Line Corporation are certificated common carriers authorized by the Interstate Commerce Commission to conduct water carrier service between ports and points on the Mississippi River system. Waterways Freight Bureau is a voluntary non-profit organization, composed of common carriers by water engaged in the transportation of freight by barge. The principal functions of the Bureau relate to rate-making procedures.

Proceedings Before The Commission

This proceeding relates to a movement of ingot molds and ingot mold stools from Neville Island and Pittsburgh, Pa. to Steelton, Ky., for which both appellee railroads and certain of appellant barge lines have competed. From the time that the plant of the receiver at Steelton became operational in 1953 until the reduced rail rate which is the subject of this action became effective in 1965, the ingot molds traffic, other than sporadic emergency shipments moved via the barge-truck route. Although more recent traffic statistics are not here of record the Commission found, and it is not disputed, that the great preponderance of the traffic would be diverted from the barge-truck to the rail route. (326 I.C.C. at 80, App. 53)

It was with a view toward capturing this traffic that the Louisville and Nashville and Pennsylvania railroads, plaintiffs below, proposed a reduced rate on ingot molds from Neville Island and Pittsburgh to Steelton of $5.11 per ton, in single shipments of not less than 600 gross tons, minimum weight 112,000 pounds per car moving in 12 cars or less at one time. At the time that this rate was published, to become effective originally on December 1, 1963, the applicable rail rate on this commodity between the involved points was $11.86 per gross ton, minimum weight 100,000 pounds per car. The total charge for movement via the barge-truck route was $5.11 per ton, composed of a barge rate of $3.32, minimum 600 gross tons, a transfer charge of 95 cents at Owensboro, Ky. and a truck charge beyond of 84 cents. It is abundantly clear, therefore, that, notwithstanding the several "incremental" theories of rate making here advanced by the four economists for the railroads,* the rate under discussion was developed by the simple expedient of matching the barge-truck charges.

Upon protest by appellant, Waterways Freight Bureau, the proposed rail rate was suspended and placed under investigation by the Commission. Pending hearing upon the matter the statutory seven months suspension period was voluntarily extended by the rail respondents until after Division 2 of the Commission, on February 17, 1965, found the rate to be just and reasonable. Thereafter the railroads made the reduced rate effective on March 19, 1965, and it remains in effect to date. The report of Division 2 found, as did that of the entire Commission subsequently, that fully distributed costs of record constitute the appropriate method of comparing the inherent advantages of low cost in intermodal rate controversies. It went on to conclude, however, that inasmuch as the

* See Exhibits Nos. 37, 38, 39 and 40 and discussion thereof in the report of Division 2 (323 I.C.C. 758 at 761, App. 28).

barge lines had voluntarily maintained a rate producing charges below its fully distributed costs ($5.11 v: $5.19) they had, in effect, waived their right to protection against a matching rate by the higher cost rail mode.

Both the rail carrier respondents and the barge line protestants petitioned for reconsideration of the report of Division 2, the former to eliminate the standard of fully distributed cost as the measure of the low cost mode and the latter to reverse the Division's finding that the barge line had waived the right to protection of its inherent cost advantage. Upon reconsideration the entire Commission, by its report of November 9, 1965 (326 I.C.C. 77, App. 49), sustained the finding by Division 2 that fully distributed costs shall constitute the measure of inherent cost advantage within the meaning of the National Transportation Policy. The Commission likewise agreed with the Division that, by this standard, the inherent advantage of low cost lies with the barge-truck route. The Commission reversed the Division's report with respect to the alleged waiver, holding that an inherent cost advantage either exists or does not exist and is not to be lost by, as here, the inadvertent establishment of a rate below a carrier's fully distributed cost level. (326 I.C.C. at 83, App. 57-58) Accordingly, the Commission required that the reduced equalizing rate of the railroads be canceled on the ground that "by reducing its rate below the level of the barge-truck full costs, respondent railroads have unlawfully impinged upon the ability of the barge-truck mode competitively to assert its inherent cost advantage." (326 I.C.C. at 85, App. 60) In view of its findings, the Commission denied the railroads' petition for reconsideration.

Proceedings Before The District Court

The two railroad respondents before the Commission, directed to cancel the reduced joint rate here in issue,

filed suit in the U. S. District Court, Western District of Kentucky, to set aside the Commission's order on grounds generally that it was based upon an unlawful and erroneous interpretation of the governing statutes and was lacking in a stated rational basis. (268 F.Supp. at 75-76, App. 6) Attesting to the importance of the intermodal controversy here presented, 48 additional railroads—virtually all the Class I railroads in the United States—intervened as plaintiffs in this proceeding. These appellants, together with the American Trucking Associations, Inc., the National Motor Freight Traffic Association, Inc., the National Tank Truck Carriers, Inc., the American Waterways Operators, Inc. were permitted to intervene in support of the Commission's order. The Department of Justice, for the United States, confessed error and participated before the District Court as an additional plaintiff.

The opinion and judgment of the three-judge District Court invalidating the Commission's action were entered on May 15, 1967. Notice of appeal was filed by these appellants with the District Court on July 14, 1967. By orders of the District Court, dated September 6, 1967 and of this Court, the due date for docketing the appeal was extended until November 9, 1967.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

A. The Commission's Interpretation Of Its Powers Under Section 15a(3).

There is here presented by way of a sequel to the opinion of this Court in the *New Haven case* (*I.C.C.* v. *New York, N. H. & H. R. Co.*, 372 U.S. 744 (1963)) the question of the power of the Interstate Commerce Commission under Section 15a(3) of the Act to carry out the objectives of the National Transportation Policy, most particularly the recognition and preservation of the in-

herent advantages of each mode of transportation. In that case, where cost comparisons were absent, this Court, after a comprehensive analysis of the legislative history of Section 15a(3), concluded that it would not "decide in advance precisely how either carrier's inherent advantages should be measured or protected" but that "these and other similar questions should be left for initial resolution to the Commission's informed judgment." (372 U.S. at 760)

The decision of the District Court below would deprive the Commission of the power to make the choice between fully distributed and out-of-pocket costs to which this Court was there referring and *require* approval of "rates which are compensatory, i.e. above relevant out-of-pocket costs," *without any determination as to which of the competing modes of transportation possesses the inherent advantage.* Thus, in nullifying the Commission's order on the ground that it allegedly misinterpreted the Congressional intent and misconstrued this Court's opinion in *New Haven*, the District Court would deny to the Commission the power to make *any* "initial resolution" of either the *fact* or the *measure* of relative inherent advantage, contrary to the clear finding of this Court in that case.

It is submitted that in thus circumscribing the powers of the Commission the District Court has misinterpreted the pertinent statutory provisions, imposed by judicial fiat a standard which the Congress expressly rejected and frustrated the specific objectives of the National Transportation Policy. It is further submitted that the rationale of the Commission's election to employ fully distributed costs as the measure of inherent advantage, within the meaning of the National Transportation Policy, is fully disclosed in the report of the Commission. This appeal, therefore, brings before this Court the substantial questions of, first, whether the Commission misinterpreted

the Congressional intent and its statutory powers under Section 15a(3) of the Act and this Court's construction of that provision in the *New Haven case, supra*, in first determining and then preserving inherent transportation advantage and, secondly, whether the report of the Commission is erroneous as a matter of law for failing to state a rational basis for its decision as found by the District Court.

In substantial part the District Court's erroneous interpretation of the governing statutory provisions lies in its failure to recognize the nature of the change wrought by Section 15a(3), enacted in the Transportation Act of 1958. As this Court observed in discussing the legislative history of that provision in the *New Haven case*, the Commission, somewhat like a "giant handicapper," had frequently struck down rate proposals in order to protect the traffic of another mode of transportation irrespective of whether the latter mode was the more efficient. As will be demonstrated, *infra*, this artificial protective policy was all that was involved in the *New Automobiles case*. (*New Automobiles in Interstate Commerce*, 259 I.C.C. 475), upon which the District Court erroneously relies.

The railroads in urging the so-called "three shall-nots" upon the Congress, to which this Court referred in the *New Haven case*, (372 U.S. at 753) would have denied the Commission the power to "consider [1] the effect of such [proposed rate] charge on the traffic of any other mode of transportation; or [2] the relation of such charge to the charge of any other mode of transportation; or [3] whether such charge is lower than necessary to meet the competition of any other mode of transportation * * *." As this Court found, the "three shall-nots" were "explicitly rejected." Had they been enacted, of course, the District Court in this proceeding might soundly have held, as it did here, that the power and, hence the inquiry,

of the Commission should cease with a determination of whether the proposed rate exceeds the out-of-pocket costs of the proponent mode, but that was not the case. The Commission interpreted, and it is submitted properly, the legislation as it was in fact enacted by the Congress.

Moreover, in concluding, as did the District Court, that the Commission's rationale in preserving a demonstrated inherent cost advantage "is directly in conflict with the conclusion of the Supreme Court in *New Haven*. (See our last above quote of the Court from that case)," (268 F.Supp. at 79, App. 14) the court below ignored a very significant word in the sentence quoted from this Court's opinion in *New Haven*. This Court said there that "if a carrier is prohibited from establishing a reduced rate that is not detrimental to its own revenue requirements *merely* because the rate will divert traffic from others, then the carrier is thwarted from asserting its own inherent advantages of cost and service." (372 U.S. at 759) (Emphasis added.) In this instance not only are the railroads not thwarted from asserting their inherent advantages, since the advantage was here found to lie with the barge-truck route, but there is no basis for any suggestion that the Commission's order herein was adopted "*merely*" to protect the barge-truck route from diversion of its traffic. To the contrary, it was invoked expressly to preserve the demonstrated inherent advantage of the lower cost barge-truck service. Hence, the *New Automobile* decision, relied upon by the court below, is clearly distinguishable.

The District Court's interpretation of Section 15a(3), in effect, enacted the "three shall-nots" which the Congress rejected, and thereby overruled the Commission's valid interpretation of its powers recited in its report. To conclude, as does the court below, that Congress intended that "carriers should normally be free to offer rates which are compensatory" (268 F.Supp. at 82, App.

20) is to attribute to the Congress a meaningless act in enacting Section 15a(3) of the Act. If that provision means only that the Commission's power thereunder, expressly required to be interpreted and exercised in light of the mandates of the National Transportation Policy, is limited to condemning non-compensatory rates, that is, those below out-of-pocket costs, Section 15a(3) would merely be duplicative of the powers long since conferred upon the Commission by Sections 1 and 15a(2) of the Act.

The change in fact effected by Section 15a(3) was to require carriers seeking protection from competitive rate making by other modes of transportation to henceforth prove their entitlement to such protection by demonstrating that, on the subject traffic, they are the inherent advantage, lower-cost mode of transportation. Whether the test to be employed in that determination be fully distributed costs, out-of-pocket costs, or some other measure, as this Court indicated in *New Haven*, is immaterial to the existence of the Commission's *power* to make a comparison of the competing modes to identify the inherent advantage mode and, upon the basis of that comparison, to take appropriate action to protect that mode against impairment of its inherent advantage by the rate action of the other mode. A substantial question here presented is the finding of the District Court that the Commission, upon interpreting the pertinent statutory provisions, erred in concluding that it possesses this power. Resolution of this question is not only of transcendent importance to the barge line industry, here faced with the prospect of a deluge of diversionary railroad rate proposals, but also to the public generally which heretofore has looked to the Commission to preserve and foster efficient low cost transportation by all modes as required by the National Transportation Policy.

B. The Basis For The Commission's Use Of Full Costs As The Measure Of Inherent Advantage.

The second substantial issue here presented is the holding of the District Court that "the Commission has failed to state a rational basis to support its selection of the "fully distributed" costs of the barge-truck mode as the floor for reduced rail rates. In reaching this conclusion the court below has ignored both the clear-cut findings of the Commission and the guide lines for consideration of the issue laid down by this Court in *New Haven* and followed by the Commission. In that case this Court twice recognized that the typical situation contemplated by the Congress in enacting Section 15(a)(3) is that of a railroad establishing a compensatory rate below its fully distributed cost and thereby forcing a lower cost competitor to establish an unprofitable rate or perhaps go out of business. (372 U.S. at 758, 759) This was precisely the factual situation in the *Ingot Molds ease* and the result which the Commission properly took steps to prevent.

The basis for the Commission's decision must be viewed in the light of its many prior reports affirming the validity of full costs as the measure of inherent advantage and upon consideration of both its report and that of Division 2. The report of the Commission gave full consideration to the testimony of the four economists testifying for the railroads. That report expressly incorporated the prior findings of Division 2 on this subject wherein the railroads' incremental cost theory was discussed and rejected. (326 I.C.C. at 77, App. 50) Division 2, finding that "For carriers to remain in business constant costs must be recovered, which is to say that full costs in the aggregate must be obtained if the nation's transportation system is to be healthy" stated that it *adhered* "to the utilization of fully distributed costs as the standard for determining the inherent advantage of low cost." (323 I.C.C. at 762, 763, App. 29-30) The stated basis for rejecting the use

of out-of-pocket or incremental costs is that the suggested measure of inherent advantage "ignores" the "existence of constant costs." (323 I.C.C. at 763, App. 30)

The Commission, in its report, quoting from the Division's conclusion adhering to the full cost standard stated "We agree." (326 I.C.C. at 81, App. 55) Applying the full cost standard to the rates before it, the Commission went on to find, just as in the example used by this Court in *New Haven*, that the railroads' rate, below the full costs of the barge-truck mode, "unlawfully impinged upon the latter's ability "to assert its inherent cost advantage" and would, if unchecked, "deprive shippers of cheaper water transportation." (326 I.C.C. at 85, App. 60)* Certainly, this is the Commission's function under the National Transportation Policy. It might also be noted that the rationale here reiterated by the Commission is that previously and more inflexibly espoused by the Department of Justice in the *New Haven case* where it urged upon brief to this Court that an inherent cost advantage is impaired "when the low cost carrier is unable to fix a rate which (a) covers its fully-distributed costs and (b) affords it a rate advantage (as against the high cost carrier) which is no less than the cost differential (measured in terms of fully distirbuted cost) between the modes." (See brief of United States before the District Court, p. 45.)

It is submitted, therefore, that the Commission has stated the rational reasons for its decision consistent with the requirements of administrative due process. The adequacy of these findings is clearly a substantial question for consideration by this Court.

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* Attention is directed to the preliminary discussion at 326 I.C.C. 82 (App. 57) whereat the Commission recognized the vulnerability of barge traffic to selective railroad competition because of the greater dependence of the former upon a limited number of commodities.

CONCLUSION

For the reasons heretofore stated, appellants believe that the questions submitted by this appeal are substantial and are of such far-reaching public importance as to require plenary consideration by this Court, with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,

AMERICAN COMMERCIAL LINES, INC., ET AL.

By: T. RANDOLPH BUCK,
P. O. Box 13244
Houston, Texas 77019

ROBERT E. WEBB,
701 Kentucky Home Life Building
Louisville, Ky. 40202

J. RAYMOND CLARK,
La Roe, Winn & Moerman
743 Investment Building
Washington, D. C. 20005

HARRY C. AMES, JR.,
Ames, Hill & Ames
523 Transportation Building
Washington, D. C. 20006

Attorneys for Appellants.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 5227

LOUISVILLE AND NASHVILLE RAILROAD COMPANY and
THE PENNSYLVANIA RAILROAD COMPANY,
Plaintiffs

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Defendants.

Before the Honorable Harry Phillips, Circuit Judge, and the Honorable Henry L. Brooks and the Honorable James F. Gordon, District Judges.

OPINION

Gordon, District Judge. This suit was brought before this Three-Judge Court, under the provisions of 28 U.S.C. §§ 1336, 2284, 2321-2325, by the Louisville and Nashville Railroad Company and The Pennsylvania Railroad Company to enjoin, annul and set aside an order of the Interstate Commerce Commission in Investigation and Suspension Docket No. 8038, *Ingot Molds, Pa. to Steelton, Ky.*, 326 I.C.C. 77 (1965). As required by law, the United States of America was named a defendant, as was the Interstate Commerce Commission.

Some 48 railroads were permitted to intervene as additional plaintiffs in support of the principal plaintiff railroads. Interested and requesting barge lines, truck carriers and related associations were permitted to inter-

vene in support of the defendant, Interstate Commerce Commission.

The United States of America, admitting that "the Order of the Interstate Commerce Commission is invalid", was, for purposes of brief and oral argument, treated as an additional plaintiff.

On January 23, 1967, oral argument was heard before this Court.

In 1953, the Green River Steel Corporation began purchasing ingot molds and stools from the Shenango Penn Mold Company at Neville Island, Pittsburgh, Pa. The shipper's plant at Neville Island is served by the Pennsylvania Railroad in connection with a short-line railroad, and the receiver's plant at Steelton, Kentucky is served directly by the Louisville and Nashville Railroad. Prior to 1965 the barge-truck route received substantially all of this traffic because its charges were below rail charges. The then and present charge for movement by barge-truck being $5.11 per gross ton, minimum 600 gross tons, and the railroad charge then being $11.86 per ton, subject to a carload minimum of 100,000 pounds.

With the stated purpose of enabling them to compete for this traffic, the respondent railroads published, effective December 1, 1963, a reduced rate on ingot molds, from Neville Island and Pittsburgh, Pa., to Steelton, Ky., of $5.11 per ton, when moved in single shipments of not less than 600 gross tons, minimum weight 112,000 pounds per car (12 or fewer cars) on one bill of lading, from one consignor at one origin to one consignee at one destination, with delivery to the originating railroad to be completed on one day. Consignee testimony indicates that if the railroads are to participate substantially in the movement, it will be necessary to have a rail rate not exceeding the total cost to the consignee of handling the ingot molds via barge-motor service.

The Commission found that the railroads' so-called out-of-pocket costs of transporting the ingot molds traffic, when computed by its own Rail Form A formula, would be $4.689 per ton, and substantially less if return on investment were eliminated. Since the reduced rail rate exceeded such costs by 42.1 cents, the Commission found that the rate would be compensatory. The Commission further found that the lower rail rate of $5.11, by attracting greater volume, would produce greater revenues in excess of out-of-pocket costs than would the higher rail rate of $11.86, which formerly had attracted only minimal tonnage, and also that "the railroad out-of-pocket costs are lower than the barge-motor lines' variable (i.e., out-of-pocket) costs". Further, that the railroads' "fully-distributed" costs amounted to $7.594 and the barge-truck "fully-distributed" costs were $5.196. These "fully-distributed" cost calculations were made by adding to the expenses incurred in handling the ingot molds traffic statistical apportionments of the respective modes' constant costs. The constant costs are expenses which are not related or traceable to the handling of any particular item of traffic.

Upon protest of the barge lines, the reduced rail rate was suspended and placed under investigation by the Commission. By voluntary agreement, the suspension period was extended until the matter was determined by Division 2. After Division 2, on February 17, 1965, 323 I.C.C. 758, found the rate to be lawful, the railroads made it effective on March 19, 1965. This rate has remained in effect since that time. Subsequently, December 2, 1965, the entire Commission in its report and order found the rate to be unlawful and ordered it cancelled, 326 I.C.C. 77, but this order of the Commission has been stayed pending consideration of the situation by this Court.

The Commission held that the determination of which mode had the inherent advantage of lower costs in han-

dling the involved ingot molds traffic should be based upon a comparison of the "fully-distributed" costs of the two modes. Upon this comparison, it found that the barge-truck route possessed the advantage of lower costs in transporting ingot molds. It further decided that the reduced rail rate unlawfully "impinged upon the ability of the barge-truck mode competitively to assert its inherent cost advantage" because the reduced rate was below the level of the "fully-distributed" costs of the barge-truck route. The Commission established the "fully-distributed" costs of the barge-truck route ($5.196) as the floor for the reduced rail rate, although the barge-truck rate of $5.11 was below this level.

The principal statutory provision governing this controversy is Section 15a(3) of the Interstate Commerce Act (49 U.S.C. § 15a(3)), which came into the Act by the enactment of the Transportation Act of 1958, 72 Stat. 572. That Section reads:

> In a proceeding involving competition between carriers of different modes of transportation subject to this Act, the Commission, in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by the carrier or carriers to which the rate is applicable. Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act.

The National Transportation Policy referred to is the preamble to the Interstate Commerce Act and provides guidance for interpreting the various sections of the Act. In its present form, it became part of the Interstate Commerce Act by the enactment of the Transportation Act of 1940, 54 Stat. 898. It reads:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating and preserving a national transportation system by water, highway and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Jurisdiction of the subject matter and venue of this action in this Court is conceded by the parties.

Under Section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 1009, the scope of our review of the Commission's order is limited to a determination of whether the order is arbitrary or not in accordance with the law, and whether the Commission's findings are supported by substantial evidence. An order is arbitrary within the meaning of the Administrative Procedure Act if it lacks a stated rational basis. See *Gilbertsville Trucking Co.* v. *United States*, 371 U.S. 115, 126 (1962); *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 167-68 (1962); *Eastern Central Motor Carriers Ass'n* v. *United States*, 239 F.Supp. 591, 594 (D. D.C. 1965). It is not in

accordance with the law within the meaning of Section 10(e) if it is based upon an erroneous interpretation or misapplication of relevant statutory provisions. See *St. Louis-San Francisco Ry. Co.* v. *United States*, 207 F.Supp. 293, 295 (E.D. Mo. 1962); *Missouri Pacific R.R. Co.* v. *United States*, 203 F.Supp. 629, 631-33 (E.D. Mo. 1962). While the determinations of an administrative agency are normally entitled to considerable deference upon review, *cf. East Texas Lines* v. *Frozen Food Express*, 351 U.S. 49, 54 (1956), and orders of the Commission which satisfy the requirements stated above are not to be disturbed on review even though the Court might reach a different result on the record, "it is not the function of a court sitting in such review merely to apply a rubber stamp of approval regardless of whether or not the criteria for affirmance are established by the record". *Cincinnati, N.O. & T.P. Ry. Co.* v. *United States*, 229 F.Supp. 572, 575 (S.D. Ohio 1964), vacated *sub. nom. Arrow Transp. Co.* v. *Cincinnati, N.O. & T.P. Ry. Co.*, 379 U.S. 642 (1965).

We have concluded that the Commission's order must be set aside, *first*, because it lacks a rational basis and thus is arbitrary and, *second*, because it is inconsistent with the objectives and purposes of Congress in enacting Section 15a(3) of the Interstate Commerce Act, 49 U.S.C. § 15a(3), and thus is not in accordance with law.

In disapproving the proposed reduced rate of the railroads, the Commission appears to us to be plainly holding up the railroad rate "to protect the traffic" of another mode. It argues, however, that the National Transportation Policy, to which it is commanded to give "due consideration" by the same provision, compels this result. It relies specifically on the requirement that the Act be administered to "recognize and preserve the inherent advantages of each (mode of transportation)".

In *Interstate Commerce Comm'n* v. *New York, N.H. & H.R.R. Co.*, 372 U.S. 744, 760-61 (1963) (referred to hereafter as *New Haven*), the Supreme Court specifically left open the question which is raised in this proceeding. The Court said:

> It is not for us to make this determination at this stage or to decide in advance precisely how either carrier's inherent advantages should be measured or protected. It may be, for example, that neither a comparison of 'out-of-pocket' nor a comparison of 'fully-distributed' costs, as those terms are defined by the Commission, is the appropriate method of deciding which of two competing modes has the cost advantage on a given movement . . . . These and other similar questions should be left for initial resolution to the Commission's informed judgment. (372 U.S. at 760-61)

This is the first case following *New Haven* in which a court has been called upon to review a determination by the Commission of how the inherent advantages of competing modes of transportation should be recognized or preserved. Since there are no directly controlling court precedents, it is for this court to determine whether the Commission's order properly implements the objectives and purposes of the Congress in enacting Section 15a(3).

We hold, first, that the Commission has failed to state a rational basis to support its conclusion that the "fully-distributed" costs of the two competing modes must be compared to determine which mode has an inherent cost advantage. In support of this conclusion, the Commission states:

> We do not agree with respondents' arguments that fully distributed costs are an inappropriate or inadequate measure of the inherent cost advantages of competing regulated carriers. That is not to say that fully distributed costs should set the floor for

> transportation prices. In the setting of particular rates, as where competition from unregulated carriers compels, a carrier should be allowed to set its rates below fully distributed costs. However, merely because a carrier is able, without incurring an out-of-pocket loss, to handle certain traffic at rates below fully distributed costs, and perhaps by diverting sufficient tonnage from its regulated competitors to maximize thereby the contribution that such traffic would make to its overhead, *does not necessarily mean that the carrier is the more efficient of the two.* Carriers, such as the railroad respondents, do not, in the circumstances here present, possess an inherent cost advantage within the context of the national transportation policy which the Commission is obligated to recognize and preserve. (326 I.C.C. at 82) (Emphasis added)

The language we have just quoted contains the only statement in the Commission's opinion in which it refers to the question of the relative efficiency of the competing carriers in carrying this traffic. This question is one of great importance in view of the Commission's obligation, declared in the National Transportation Policy and the ratemaking provisions of the Act, to promote efficient and economical use of transportation resources and the establishment of rates which are as low as possible. The importance of these considerations has been underscored repeatedly by the courts. Thus, the Supreme Court in *New Haven* emphasized the Congressional policy to promote "hard competition" (372 U.S. at 759). In *St. Louis-San Francisco Ry. Co.* v. *United States*, 207 F.Supp. 293, 298-99 (E.D. Mo. 1962), the court emphasized the obligation of the Commission to consider "the need, in the public interest, of adequate and efficient transportation service at the lowest cost consistent with the furnishing of such service".

The Commission states that: "Merely because a carrier is able, without incurring an out-of-pocket loss, to handle

certain traffic at rates below fully-distributed costs and by gaining added traffic maximize the contribution which such traffic makes to its overhead, does not necessarily mean that the carrier is the more efficient of the two" (326 I.C.C. at 82). Are we not entitled to ask *in what circumstances*, if any, would the carrier with lower out-of-pocket costs be *less efficient*? Are we not entitled to some explanation *why the standard* chosen by the Commission *measures* which carrier is more efficient in providing the service here involved? On the basis of the Commission's report, we are left completely in the dark on these matters.

The Commission's failure to explain how its approach for recognizing and preserving the inherent advantages of the different modes of transportation promotes the most efficient and economical use of transportation resources is particularly wanting since the record before it contained testimony addressed to this question; though the Commission was not bound to accept same, such did at least, we think, make it necessary for the Commission to set forth adequate reasons to support its own approach. Such reasons are lacking in the Commission's report.

For example, the record indicates that one of the constant expenses which is included in the railroads' "fully-distributed" costs is an allocated share of the deficits (very substantial in amount) incurred by the railroads in providing passenger and less-than-carload services.

The barge lines and motor freight carriers do not provide passenger services. Is it unrealistic in comparing the relative efficiency of the two modes, to include as a part of the railroads' costs these deficits? Is it equally unrealistic in determining which mode is more efficient, to include any other constant expenses in the costs being compared, since these expenses, like the passenger deficits,

are not related to furnishing the particular service? The Commission no where comes to grips with these questions, nor does it set forth its own analysis in making its determination.

In its statement supporting its conclusion hereinabove, the Commission also says that, "In the setting of particular rates, as where competition from unregulated carriers compels, a carrier should be allowed to set its rates below fully distributed costs." This statement reflects the Commission's use of an out-of-pocket cost comparison to determine which of the competing modes has an inherent advantage in situations where there is substantial competition from unregulated carriers. In such situations, the Commission finds a reduction lawful if it exceeds the proponent carrier's out-of-pocket costs. See *Grain in Multiple-Car Shipments—River Crossings to the South*, 321 I.C.C. 582 (1963).

The Commission leaves unexplained its use of different pricing floors *depending upon whether a reduced rate* is intended to meet *regulated* or *unregulated* competition.

We believe that the reasons given by the Commission in the Southern Grain case to support its conclusion that the public interest is fostered by permitting a regulated mode to compete with nonregulated lawful carriers, by offering reduced rates which exceed out-of-pocket costs, logically would seem to apply equally where competition is between two competing regulated modes.

Likewise, we reject as adequate support for the Commission's decision here, its finding that since railroad out-of-pocket costs are lower than barge-motor line variable costs, the former could wage a longer rate battle than the latter, with the Commission powerless to intercede and halt such devastation, all to the prejudice of recognition and preservation of inherent advantage as contemplated

by national policy. The Commission's power to disapprove non-compensatory rates and prevent destructive competition is firmly established. Such an argument that the consequence of a rate reduction below fully distributed costs would leave the Commission powerless has heretofore been rejected. *Missouri Pacific R.R. Co.* v. *United States*, 203 F.Supp. 629, 635 (E.D. Mo. 1962).

Citations by the Commission of several prior decisions in which it compared "fully-distributed" costs to determine which mode had an inherent advantage contain no further explanation to support such a standard, although not determinative, we note that the Commission has not consistently employed a "fully-distributed" cost standard. For example, in one recent case, *Roasted Coffee and Coffee Extracts From Texas Gulf Ports to Texas*, 314 I.C.C. 675, 680 (1961), the Commission says, "It would be inconsistent with the national transportation policy to prohibit the respondents from establishing competitively necessary rates which are shown to be compensatory." And see *Paint and Related Articles in Official Territory*, 308 I.C.C. 439 (1959); *Fresh Meats, Transcontinental, Westbound*, 309 I.C.C. 529, 544 (1960); *Prue Motor Transp. Inc.* v. *Boston & Maine R.R.*, 316 I.C.C. 299, 302 (1962). *Cf. Iron Ore, Cleveland, Ohio to Ohio and Pennsylvania*, 323 I.C.C. 746, 754 (1965), complaint dismissed, *Baltimore & Ohio R.R. Co.* v. *United States*, 249 F.Supp. 712 (W.D. Pa. 1965), aff'd *per curiam* 385 U.S. 3 (1966).

The Commission also relies upon the decision of the Supreme Court in *New Haven*. We have previously pointed out that the Supreme Court there specifically left open for later decision the question which is presented in this proceeding, after making it clear that this question was not before it (372 U.S. at 749-50). As we read the Supreme Court's opinion, it held that the Commission

cannot, under Section 15a(3) and the National Transportation Policy, find unlawful the reduced rate of one mode merely because it would divert some or even all of the traffic from a competing mode. As the Court said:

> If there is one fact that stands out in bold relief in the legislative history of § 15a(3), it is that Congress did not regard the setting of a rate at a particular level as constituting an unfair or destructive competitive practice simply because that rate would divert some or all of the traffic from a competing mode. (372 U.S. at 759)

The Court also said that a reduced compensatory rate should not be found unlawful unless this is necessary to preserve the inherent advantages of a competing mode (372 U.S. at 758). And it added:

> If a carrier is prohibited from establishing a reduced rate that is not detrimental to its own revenue requirements merely because the rate will divert traffic from others, then the carrier is thwarted from asserting its own inherent advantages of cost and service. (372 U.S. at 759)

We note that in the situation before us the Commission found not only that the reduced rail rate would be compensatory, but that it would produce greater revenues in excess of out-of-pocket costs than would the former higher rate. The reduced rate therefore will not be detrimental to the railroads' revenue requirements. In these circumstances and in light of the inadequacy of the Commission's report with respect to the recognition and preservation of inherent advantages, we are of the belief that *New Haven* provides no support for the Commission's order.

We also hold that the Commission has failed to state a rational basis to support its selection of the "fully-

distributed" costs of the barge-truck mode as the floor for reduced railroad rates. The Commission said:

> In short, by reducing its rate below the level of the barge-truck full costs, the respondent railroads have unlawfully impinged upon the ability of the barge-truck mode competitively to assert its inherent cost advantage. This action we cannot approve. To hold otherwise we would deprive barges from asserting an inherent cost advantage and we would deprive shippers of cheaper water transportation. Cf. *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567, 575-579 (1947); *Dixie Carriers, Inc.* v. *United States*, 351 U.S. 56 (1956). (326 I.C.C. at 85)

How does the reduced railroad rate deprive shippers of cheaper water transportation? It appears to us to only provide shippers with an alternative form of transportation at an equivalent rate. The decisions cited by the Commission furnish no support for its conclusion, since none was concerned with Section 15a(3) or the setting of minimum rate floors. In *Mechling*, railroads carrying grain from Chicago to Eastern cities were charging more for carrying grain which arrived in Chicago by water carrier than for grain which arrived by rail. The Supreme Court upheld the Commission in finding that this action discriminating against water carriers violated § 3(4) of the Act. In *Dixie Carriers*, the railroads had refused to establish a joint rail-barge rate between two points in Texas. The Supreme Court held that this refusal constituted a discrimination in rates between connecting lines prohibited by § 3(4) of the Interstate Commerce Act, and that the Commission had a duty under § 307(d) to establish through routes and joint rates for rail-barge transportation. No such issue of discrimination is presented here.

We cannot escape the conclusion that the ultimate finding that the rates in issue are not just and reasonable

was motivated by the Commission's desire to prevent any rate competition which threatens the continued existence of a competitor. In support of its determination to employ a comparison of "fully-distributed" costs to determine which mode possesses an inherent advantage, the Commission stated its belief that "an inherent cost advantage under the National Transportation Policy reasonably could not embrace a concept that would impair the ability of a carrier not only to compete but to exist" (326 I.C.C. at 82). This rationale is directly in conflict with the conclusion of the Supreme Court in *New Haven*. (See our last above quote of the Court from that case.)

It is our belief that the Commission's order is based upon a misinterpretation or misapplication of the relevant statutory provisions. We gain support from the legislation itself, its history, and its application in other recent cases. In *Missouri Pacific R.R. Co.* v. *United States*, 203 F.Supp. 629, 633 (E.D. Mo. 1962), a three-judge District Court stated:

> "As far back as 1945, in the case of New Automobiles in Interstate Commerce, 259 I.C.C. 475, the Commission had said, l. c. 538:
>
> > 'As Congress enacted separately stated rate-making rules for each transport agency, it obviously intended that the rates of each such agency should be determined by us in each case according to the facts and circumstances attending the movement of the traffic by that agency. In other words, *there appears to be no warrant for believing that rail rates, for example, should be held up to a particular level to preserve a motor-rate structure, or vice versa.*' (Emphasis added)
>
> In spite of these words, the Commission had, in a line of cases through the early 1950's, often canceled reduced rates, though they were fully compensatory.

> While the Commission has traditionally contended that such cancellations were not ordered to protect other modes, the Congress felt otherwise, and enacted Section 15a(3) at least in part as a direction to the Commission to treat competitive rate cases in a manner consistent with the language and spirit of New Automobiles."

We do not think there can be any doubt that the underlying purpose of Congress in enacting Section 15a (3) was to direct the Interstate Commerce Commission to observe the original intent of Congress in 1940 and to restore and adhere to the policy set forth in *New Automobiles* with respect to the preservation of inherent advantages. Both the Senate and House Committee Reports are explicit on this matter,[1] and there were also

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[1] The Senate Report, after stating it "agrees with and wishes to emphasize the import of" the Senate Subcommittee report, quotes the following from it:

> It nevertheless appears that the Interstate Commerce Commission has not been consistent in the past in allowing one or another of the several modes of transportation to assert their inherent advantages in the making of rates. The subcommittee recommends, therefore, that the Commission consistently follow the prinpicle of allowing each mode of transportation to assert its inherent advantages, whether they be of service or of cost. In 1945 in New Automobiles in Interstate Commerce (259 I.C.C. 475), the subcommittee believes that the Commission properly construed the intent of Congress in this respect when it said:
>
> > 'As Congress enacted separately stated rate-making rules for each transport agency, it obviously intended that the rates of each such agency should be determined by us in each case according to the facts and circumstances attending the movement of the traffic by that agency. In other words, there appears no warrant for believing that rail rates, for example, should be held up to a particular level to preserve a motor-rate structure, or vice versa' (259 I.C.C. at p. 238).
>
> The subcommittee wishes to affirm the interpretation of the Commission given in the Automobile case epitomized in the words quoted above. The subcommittee therefore believes it

repeated statements of such an intent in the hearings and debates on Section 15a(3).[2] See *Interstate Commerce Comm'n* v. *New York, N.H. & H. R.R. Co.*, 372 U.S. 744, 755-56 (1963).

There are indications that Congress believed the National Transportation Policy would not prevent carriers from establishing rates which exceeded out-of-pocket costs in the kind of situation here presented. For example, Congressman Wolverton, who was a member of the House Commerce Committee, which reported the bill, said that: "If each mode of transportation is permitted to have rates not below a compensatory figure so that competition can really exist, I think you are then preserving the rights, the inherent rights of each."[3] Congressman O'Hara, another member of the House Commerce Committee, stated that: "If [one] mode of transportation has a compensatory rate and it is lower than that of the competitor, the Interstate Commerce Commission would have to allow [it] to charge a lower rate." (104 Cong. Rec. 12536)[4] A list of "Decisions of the Interstate Com-

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necessary to amend the act only so as, in effect, to admonish the Commission to be consistent in following the policy enunciated in the Automobile case thus assuring reasonable freedom in the making of competitive rates.

The subcommittee anticipates that the broad effect of this amendment will be to encourage competition between the different modes of transportation to the benefit of the shipping public. S. Rep. No. 1647, 85th Cong., 2d Sess., pp. 2-3.

The House Report is to the same effect. H. Rep. No. 1922, 85th Cong., 2d Sess., p. 14.

[2] See, *e.g.*, 104 Cong. Rec. 10842, 12531, 12532; Hearings on S. 3778 before the Senate Committee on Interstate and Foreign Commerce, 85th Cong., 2d Sess., pp. 14, 29, 178.

[3] Hearings on Railroad Problems Before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 85th Cong., 2d Sess., p. 409.

[4] Senators Schoeppel, Lausche and Smathers likewise indicated that compensatory rates should normally be permitted. Hearings

merce Commission in Which the Policy of the New Automobiles Case Has Not Been Followed", which was before Congress in 1958, likewise makes it plain that Congress was concerned about cases in which the Commission had declared reduced rates unlawful, although finding that they were compensatory. See Hearings on S. 3778 Before the Senate Committee on Interstate and Foreign Commerce, 85th Cong., 2d Sess., pp. 86-91, 174-175.

In a more general vein, the Committees reporting on the bill emphasized that the chief thrust of the amendment was to encourage competitive ratemaking among the different modes of carriage. The Report of the Senate Committee on Interstate and Foreign Commerce described Section 15a(3) as "designed to encourage competition * * * by allowing each form of transportation * * * full opportunity to make rates reflecting the inherent advantages each has to offer * * *" and it expressed approval of the following language of the Supreme Court in *Schaffer Transportation Co.* v. *United States*, 355 U.S. 83 (1957):

> The ability of one mode of transportation to operate with a rate lower than competing types of transportation is precisely the sort of 'inherent advantage' that the congressional policy requires the Commission to recognize.

S. Rep. No. 1647, 85th Cong., 2d Sess., p. 3; and see H. Rep. Co. 1922, 85th Cong., 2d Sess., pp. 13-15.

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on S. 3778 Before the Senate Committee on Interstate and Foreign Commerce, 85th Cong., 2d Sess., pp. 11, 56 and 111. Moreover, we note that Congress specifically rejected a provision which would have prevented carriers from offering rates below fully-distributed costs in cases of inter-modal competition. Senator Lausche indicated that the proposal, if adopted, "would completely negative the purposes and intent of the Congress in 1940 and in 1953 when it declared that the inherent advantages of each mode of transportation shall be preserved in the interest of the public". Hearings on S. 3778, *supra*, p. 26.

We observe that the specific Congressional mandate in 1958 was that the Commission *should henceforth be bound in establishing minimum rates by the original intent of Congress in 1940* and the decision of the Commission in *New Automobiles*. In *New Automobiles* the Commission conducted a general investigation of all rates subject to its jurisdiction applying to the transportation of new automobiles, including rates of various forms of rail, truck and water carriage. The motor carriers, who initiated the proceeding, alleged that rail reductions made on an out-of-pocket basis would deprive them of their inherent advantages which the Commission was obligated to preserve by the terms of the National Transportation Policy (259 I.C.C. 539), and asked the Commission "to lay down the principle that in meeting highway competition the railroads should in no instance go below the fully-distributed rail costs or the truck rates". (259 I.C.C. 530). The railroads, on the other hand, asked that they be left free to meet competition by reducing rates to whatever level was necessary in order to attract traffic, provided their rates exceeded out-of-pocket costs (*Id.* at 532-33).

In determining "the relative fitness of the various agencies of transportation" from a cost standpoint, the Commission there compared the railroads' out-of-pocket costs with the truck "full" costs, after finding that the truck "full" costs were substantially the same as its out-of-pocket costs (259 I.C.C. at 529). Upon this comparison, which essentially was of the two modes' out-of-pocket costs, the Commission found that for shorter distances the motor carriers were the low-cost agency, while for the longer distances the cost advantage was with the railroads. Finding that, "According to the cost studies the rates of the several forms are generally compensatory, except in scattered instances", it held that the rates exceeded a "reasonable minimum level" and were lawful. It defined a compensatory rate as "one which is re-

munerative, i.e., covers the out-of-pocket costs, as hereinbefore defined, of handling the particular traffic under consideration, including a proper return on investment".

Noting that "within reasonable limits the public is entitled to the reduced rates brought by competition", the Commission indicated that its decision carried out the intent of Congress.

Thus, in *New Automobiles*, the Commission indicated its understanding that Congress intended that carriers should normally be free to offer rates which were compensatory. This construction of the National Transportation Policy is clearly supported by the legislative history of the Transportation Act of 1940. Congress not only rejected all proposals which would have prevented carriers from offering compensatory rates which were below fully-distributed costs, including the so-called Miller-Wadsworth amendment,[5] but in so doing it made

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[5] The so-called Miller-Wadsworth amendment to the minimum rate section would have provided:

> In order that the public at large may enjoy the benefit and economy afforded by each type of transportation, the Commission shall permit each type of carrier or carriers to reduce rates so long as such rates maintain a compensatory return to the carrier or carriers after taking into consideration overhead and all other elements entering into the cost to the carrier or carries for the services rendered. (84 Cong. Rec. 6074)

This amendment was included in the bills originally passed by the Senate and the House (84 Cong. Rec. 6074, 9962, 9977), but the Joint Conference Committee of the Senate and the House, to whom these bills were referred, eliminated it. Following lengthy debate, particularly in the House, as to whether it should be restored, ultimately both the Senate and the House voted not to restore it (86 Cong. Rec. 10193-94, 11766-67). Various other proposals which were advanced to prohibit rates below fully-distributed costs in inter-modal competitive situations were also rejected. See H.R. 2531, 76th Cong., 1st Sess., sec. 41; Hearings on S. 1310 and S. 2016, S. 1869 and S. 2009 Before the Senate Committee on Interstate Commerce, 76th Cong., 1st Sess., p. 698.

> . . . It is unnecessary that each individual rate, in order to be profitable, must bear its full share of all costs, including over-

known its belief that such a restriction on competition would be extremely undesirable both from the standpoint of shippers and from the standpoint of the general public seeking the most efficient use of transportation resources.

For example, in explaining why the Miller-Wadsworth amendment was rejected, Congressman Wolverton, one of the managers of the bill in the House and a House conferee as well as a member of the House Commerce Committee, stated:

> The amendment would not only slow up and seriously hamper all reductions but would absolutely prevent a great many desirable reductions from being made.

We believe that the Commission failed to take adequate account of the Congressional intent that carriers should normally be free to offer rates which are compensatory, i.e., above relevant out-of-pocket costs. Moreover, we think the Commission's decision here is inconsistent with its philosophy in *New Automobiles*. The Commission's order is therefore not in accordance with law.

We do not mean to suggest that there may not be situations where the Commission has power, under Section 15a(3) and the National Transportation Policy, to prohibit reduced rates even though they are compensatory. What we do suggest is that Congress has expressed a clear intent that reduced compensatory rates should normally

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head, and produce a reasonable profit above such costs. If a rate is high enough to pay more than out-of-pocket operating expenses, it helps meet some of the constant overhead.

. . . We should do nothing that will unnecessarily prevent or delay rate reductions; strike a blow at the fundamental principle of rate making upon which this country was developed, and obstruct, or hinder the free flow of commerce which is so essential to our economic welfare. (86 Cong. Rec. 10190-91)

And see 84 Cong. Rec. 9963, 9970; 86 Cong. Rec. 10179, 10187, 11766-67.

be allowed and that the record here and the Commission's report supply no basic for disregarding that intent.

For the foregoing reasons, the order of the Commission in *Ingot Molds, Pa. to Steelton, Ky.*, 326 I.C.C. 77 (1965), is hereby set aside and permanently enjoined and the matter is remanded to the Commission for action not inconsistent with this opinion.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 5227

LOUISVILLE AND NASHVILLE RAILROAD COMPANY and
THE PENNSYLVANIA RAILROAD COMPANY,
Plaintiffs,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Defendants.

JUDGMENT

This cause having been heard on the plaintiffs' complaint seeking to enjoin, set aside and annul a report and order of the Interstate Commerce Commission, dated December 2, 1965, in a proceeding styled Investigation and Suspension Docket No. 8038, *Ingot Molds, Pa. to Steelton, Ky.*, 326 I.C.C. 77 (1965); and the parties appearing by counsel having been heard and the issues duly tried; and the Court having concluded in its opinion that plaintiffs are entitled to judgment:

It is hereby Ordered, Adjudged and Decreed that the above described report and order of the Interstate Commerce Commission, entered December 2, 1965, be set aside and the Interstate Commerce Commission is hereby enjoined from enforcing it with prejudice. The matter is remanded to the Commission for reconsideration and such further action as the Commission may deem appropriate, not inconsistent with the opinion this day rendered by this court.

Issued at Louisville, Kentucky, this 15th day of May, 1967.

/s/ Harry Phillips
HARRY PHILLIPS
United States Circuit Judge

/s/ Henry L. Brooks
HENRY L. BROOKS
United States District Judge

/s/ James F. Gordon
JAMES F. GORDON
United States District Judge

A Copy: Attest

MARTIN R. GLENN, Clerk

By /s/ Loraine Milly
Deputy Clerk

APPENDIX C

Investigation and Suspension Docket No. 8038

INGOT MOLDS, PA., TO STEELTON, KY.

Decided February 2, 1965

Proposed multiple-car rate, minimum 600 gross tons, on ingot molds and ingot mold stools from Neville Island and Pittsburgh, Pa., to Steelton, Ky., found just, reasonable, and otherwise lawful. Proceeding discontinued.

Carl Helmetag, Jr., and *E. R. Leigh* for respondents.

Harry C. Ames and *Wesley A. Rogers* for protestants.

REPORT AND ORDER OF THE COMMISSION

DIVISION 2, COMMISSIONERS FREAS, TUCKER AND TIERNEY

FREAS, *Commissioner:*

By schedules filed to become effective on December 1, 1963, the respondent railroads[1] proposed to establish a reduced rate[2] on ingot molds and ingot mold stools,[3] both herein called ingot molds, from Neville Island and Pitts-

[1] The Pennsylvania Railroad Company and the Louisville and Nashville Railroad Company, hereinafter called the Pennsylvania and the L. & N., respectively.

[2] Rates, differences in rates, costs, and charges are stated per gross ton of 2,240 pounds, unless otherwise indicated.

[3] An ingot mold is a cast-iron form in which molton steel is cast in making ingots. The stool is the base upon which open-bottom molds stand.

burgh, Pa., to Steelton, Ky., of $5.11 when moved in single shipments of not less than 600 gross tons, minimum 112,000 pounds per car (12 or fewer cars), on one bill of lading, from one consignor at one origin to one consignee at one destination, with delivery to the originating railroad to be completed on one day. Upon protest of the Waterways Freight Bureau, the operation of the schedules was suspended to and including June 30, 1964, and an investigation was instituted. The effective date of the schedules has been voluntarily postponed to and including March 31, 1965. Evidence was submitted at the hearing by the respondents in support of the proposed rate, and in opposition thereto by the aforementioned bureau and certain of its members,[4] collectively called protestants. Due and timely execution of our functions under section 15(7) of the Interstate Commerce Act imperatively requires the omission of recommended report and order in this proceeding.

The ingot molds involved herein move principally by barge in connection with truck delivery from the producing plant of the Shenango Perm Mold Company at Neville Island, located in the Pittsburgh port area, to the Green River Steel Corporation at Steelton, 3.5 miles from the Owensboro, Ky., river-rail terminal where barge facilities are located. The shipper's plant is served by the Pennsylvania in connection with the short-line railroad, the Pittsburgh, Chartiers & Youghiogheny Railway Company, hereinafter referred to as the P. C. & Y., and the receiver's plant is served directly by the L. & N.

The proposed rate of $5.11 is equal to the overall charges to the receiver for the barge movement. The latter consist of a barge rate of $3.32, minimum 600 gross tons, a barge-to-truck transfer charge of 95 cents

[4] Mississippi Valley Barge Line Company, Ohio River Company, and Union Barge Line Company.

at Owensboro, and the for-hire truck charge of 84 cents for the movement from Owensboro to Steelton. The present rail rate is $11.86,[5] subject to a carload minimum of 100,000 pounds.

From 1953, following the completion of the receiver's plant at Steelton, to the present time, the movement has been almost exclusively by barge. From 1953 to 1963, the barge rates have increased from $2.84 to $3.32, and the minimum has increased from 500 to 600 gross tons. Notwithstanding the increased minimum weight and rate, net tonnages of 3,878, 4,320, and 5,017 in 1961, 1962, and 1963, respectively, indicate a steady rise in the volume of this traffic moving by barge in recent years. During the first 3 months of 1964, the barge tonnage was 1,500. Barge shipments, on the average, exceed 600 tons. Analysis of systemwide revenues for bureau members for 1962 indicates that iron and steel, which includes class 579 in which the carriers report ingot molds for statistical purposes, is the third most important commodity group transported in barge service, accounting for 10.81 percent of total revenue. It is 1 of 11 commodity groups which account for 81.45 percent of total barge traffic.

In 1953, the rail rate was $13.50, minimum 50,000 pounds. In 1958, it reached a high of $16.72, same minimum, before it was reduced to $12.52, minimum 100,000 pounds. Subsequently, it was reduced to the present rate of $11.86.

The stated purpose of the instant proposal is to enable the respondents to compete for this traffic. Rail shipments have been limited to isolated instances when the receiver's production schedules have required special orders of certain kinds of ingot molds. For example, in 1962 the railroads moved two shipments aggregating 112

[5] This is a conversion of the rate per net ton of $10.59, shown in the tariff, to a gross-ton basis.

net tons; in 1963, five shipments aggregating 276 net tons; and during the first 3 months of 1964, two shipments aggregating 116 net tons. Consignee testimony indicates that if the railroads are to participate substantially in the movement it will be necessary to have a rail rate not exceeding the total cost to the consignee of the present method of handling the ingot molds via barge-motor service.

Cost Considerations

Cost studies were submitted by the respondents and the protestants. They are discussed in detail in the appendix hereto. As stated therein, the respondents computed out-of-pocket costs as 483.5 cents, utilizing eastern district and southern region costs based on railroad cost scales by territories for the year 1961, contained in public statement No. 5-63 prepared by our cost finding section, and as 468.9 cents, by the application of Rail Form A to operating data of each respondent for the year 1962. Excluding return on investment, the respective costs are shown as 432 and 419 cents. Fully distributed costs are shown as 759.4 cents.

The protestants restated the respondents' statement No. 5-63 costs as 505.8 cents on an out-of-pocket basis, and 785 cents on a fully distributed basis. They also compute the average rail full cost by various methods as 759.4, 617.1, 687.9, and 564.3 cents. These methods are described in the appendix hereto, and the differences in the out-of-pocket and fully distributed costs as computed by the respondents and the protestants are also discussed therein.

Recognizing that costs are not always ascertainable with mathematical precision, we have found in the appendix hereto that the rail out-of-pocket costs reasonably approximate 468.9 cents, as shown by the respondents upon individual application. Eliminating return on in-

vestment,[6] they would be substantially lower. The rail fully distributed cost figure of approximately 759 cents is reached in a manner consistent with recognized procedures if the use of territorial averages is accepted. Having found the costs upon individual application to be more appropriate however, those on a fully distributed basis would be somewhat lower than 759 cents. We therefore find that the proposed rate exceeds the respondents' out-of-pocket costs, but is below their fully distributed costs.

The protestants, based on the Commission cost section's new Barge C formula, compute the cost of transporting this traffic by the Mississippi Valley Barge Line Company. The record fails to demonstrate, however, that those costs are reasonably representative of the costs of all protestants of record. In any event, when the aggregate charges of $1.79 for barge-to-truck transfer and for-hire trucking are included,[7] the full costs are computed as 535.68 cents, based on an operating ratio for that bargeline of 87.9 percent (the company's average for the last 3 years), and as $5.1959, including a return on investment of 4 percent. To compare validly with rail fully distributed costs, use of the latter figure is more appropriate.

Four transportation economists testified in respondents' behalf to the effect that incremental or out-of-pocket cost, rather than fully distributed cost, is the proper basis both for establishing pricing floors and also for determining the most economic form of transportation. They urge that no meaningful comparison of full costs can be made in this proceeding because of the dissimilarity between the rail and water cost formulas in allocating overhead

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[6] *Cf. Coal from Southern Mines to Tampa and Sutton, Fla.*, 318 I.C.C. 371; *Baltimore & O. R. Co.* v. *Chicago & E. I. R. Co.*, 322 I.C.C. 572.

[7] See *Sugar, South to Indiana, Ohio River, Intermediate Points*, 319 I.C.C. 782, 784, 785.

costs to the traffic involved. They further contend that only in competitive situations between regulated modes has the use of fully distributed costs ordinarily been found controlling, and that there is no sound justification for such usage.

Service Considerations

Protestants contend that the bargelines are disadvantaged at a parity of charges because of inferior service, and cite the loss of other traffic when differentials were eliminated. However, a comparison of the services indicates that loss and damage has not been experienced on the barge movement and the consignee anticipates none on the rail movement. The rail line-haul service is faster. Nevertheless, considering that plant facilities are adequate to receive shipments of 600 gross tons and the movement is primarily to stockpile, the advantages of faster rail service are not material to consignee. The consignor bears the cost, and must arrange, for the movement of the traffic from its mill to the barge dock and for loading the traffic into the barge. The rail service is door to door, but the intraplant switching of rail cars is performed by the consignee in its equipment and at its expense. It is protestants' position that they can only participate in this traffic when the cost to the shipper is less than all-rail service.

General Discussion and Ultimate Conclusions

For carriers to remain in business constant costs must be recovered, which is to say that full costs in the aggregate must be obtained if the Nation's transportation system is to be healthy. Thus, whenever competive carriers of different modes assert cost advantages inherent to their respective modes, we have recognized in fully distributed costs the only sound standard of measurement reflecting as many attributable constant costs as it is

reasonably practicable to apportion. Difficulties of apportioning constant costs do prevail. See *Grain in Multiple-Car Shipments—River Crossings to So.*, 321 I.C.C. 582, 597, reversed on other grounds in *Cincinnati, N. O. & T. P. R. Co.* v. *United States*, 220 F. Supp. 46 (S. D. Ohio 1963), appeal docketed, U. S. July 29, 1964, (No. 545). Since constant costs are not directly related to service units, they are assigned on an average statistical basis. In our opinion, however, that assignment does not detract from their worth.[8] We adhere to the utilization of fully distributed costs as the standard for determining the inherent advantage of low cost in the situation presented. Stated differently, we recognize the existence of constant costs. The use of out-of-pocket or incremental costs advanced herein by respondents ignores them. We decline to so limit our ratemaking powers.

However, a determination that the advantage of low cost lies with one mode or another does not end matters. Nor is such a determination necessarily to be equated with the appropriate rate level. We are not bound by a mechanical formula. Rather, it must be found that a competing rate is destructive of such an advantage. A finding to this effect must of necessity rest with the facts and circumstances in each case.[9] Here, it cannot be controverted that protestant bargelines have chosen for some time to forego the revenues of a rate set at a level which would return fully distributed costs. They have done so voluntarily and, considering the rail rate levels and the fact that the traffic has moved almost exclusively by barge since 1953, without being subject to any compe-

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[8] Compare our action in divisions cases under section 15(6) in *Louisville & N. R. Co.* v. *Southern Ry. Co.*, 319 I.C.C. 639, 660, sustained in *Carolina & N.W. Ry. Co.* v. *United States*, 230 F. Supp. 581 (W. D. N. C. 1964), appeal docketed, U. S. Nov. 16, 1964.

[9] *Cf. Reduced Transcontinental Lumber Rates, 1961*, 318 I.C.C. 815, 844.

titive compulsion insofar as respondents are concerned.[10] From all that appears of record, protestants' choice in setting their rate at the level respondents now seek merely to meet was also reached voluntarily. Such action affords no basis for assuming that the action of respondents in meeting but not undercutting protestants' rate destroys an inherent cost advantage. Indeed, we think it plain that protestants, being in a position of their own free choosing, cannot successfully object to a rate which, we find, will return revenues reasonably in excess of out-of-pocket costs and which is designed merely to meet competition with its resulting benefit to the shipping public. It is well to note as to shippers that there is a public interest aspect in reductions to be achieved through competitive rate making which we are required to recognize in addition to the revenue considerations of the respective modes. Moreover, the proposed rate reasonably appears to be designed to contribute in the aggregate to the constant costs and will afford respondents the opportunity to utilize equipment more fully thereby reducing unit costs. This is so despite protestants' assertion that respondents received greater revenue in excess of out-of-pocket costs under the present $11.86 rate in 1963 in handling five carloads of the involved traffic than they would if they had secured, under the proposed rate, the entire 1963 tonnage which moved by barge and rail. A contrary and more accurate result obtains when the costs we have found appropriate herein (468.9 cents) are utilized. Moreover, the steady rise in traffic movements in 1961, 1962, and 1963 permits an inference that greater tonnage will be available for future movements. Finally,

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[10] The last-mentioned factor in particular, as well as those discussed hereinafter, clearly distinguishes the instant proceeding from the situations presented in *Grain from Idaho, Oreg. & Wash. to Ports in Oreg. & Wash.*, 319 I.C.C. 534 (since reopened for further hearing), and *Pig Iron, Buffalo, N. Y., to Chicago, Ill., and Gary, Ind.*, 321 I.C.C. 121.

we see no basis for limiting respondents to what are in actuality isolated movements on special orders which may or may not occur again, or to subject the receiver to the much higher charges in such instances. In view of the foregoing, we find the proposed rate compensatory, and just and reasonable. It may readily be inferred that protestants would have raised their rate to a higher level heretofore had they themselves deemed it appropriate to protect their inherent advantage. However, their realization of what we must assume in the circumstances to be a profitable level of revenue at lower rates negates any sound basis for finding destructive competition or a tendency thereto. Indeed, the record impels the conclusion that protestants' cost advantage is such that they are in a position to continue to compete effectively and still charge a rate reasonably in excess of out-of-pocket costs, *cf. Interstate Commerce Commission* v. *New York, N. H. & H. R. Co.*, 372 U.S. 744, 761, n. 14 (1963), hereinafter called the *New Haven* case, even if they were to reduce their rate. Stated in another manner, the situation presented is one permitting the reasonable play of competition. *Cf.* Testimony of then Chairman Freas in Hearings Before the Subcommittee on Surface Transportation of the Senate Committee on Interstate and Foreign Commerce on Problems of the Railroads, 85th Cong., 2d sess., pt. 3, at 1884 *passim* (1958).

Service considerations as to the involved movement are not shown of record to be controlling. For example, stockpiling and adequate storage space do not necessitate faster service as such. In addition, certain aspects of the two services may be said to be largely offsetting. In this regard, the consignor must arrange for the movement to, and loading on, the barge when such service is utilized. Initially, it is not urged nor is it shown that this service factor and the absorption of the attendant costs by the consignor influence the routing of the traffic. *Cf. Penn-*

sylvania R. Co. v. *United States*, 202 F. Supp. 584 (E. D. Pa. 1962). As an offsetting factor, the consignee is required to perform intraplant switching in its own equipment at its expense. In any event, even assuming inferiorities in protestants' service, there would be corresponding advantages in that of respondents. The national transportation policy is directed to a recognition and preservation of inherent advantages.

In the circumstances presented, we find for the encouragement of lawful competition and conclude that the proposed rate is just and reasonable, and, consistent with the Court's evaluation of section 15a(3) in the *New Haven case*, not destructively competitive.

COMMISSIONER TUCKER concurs in the result.

It is ordered, That this proceeding be, and it is hereby, discontinued.

By the Commission, division 2.

BERTHA F. ARMES,
Acting Secretary

(SEAL)

APPENDIX

RESPONDENTS' COST STUDIES

The respondents submitted four cost studies. Two studies were based upon eastern district and southern region out-of-pocket costs, as shown in I.C.C. Statement No. 5-63. The other two are hereinafter referred to. The respondents also computed fully distributed costs using the eastern district for the Pennsylvania portion of the haul and the southern region for the L. & N. portion of

the haul. These fully distributed costs amounted to 759.4 cents per gross ton.

Territorial studies.—In their cost studies based on Statement 5-63, respondents applied territorial unit costs based on 50 gross tons per car, 600 gross tons per shipment, or a 12-car block with territorial average empty returns in order to reflect what they suggest to be the greatest cost anticipated from this movement.

For the purposes of the above cost studies, the P. C. & Y. and the Pennsylvania costs are based on eastern district out-of-pocket unit costs; and the L. & N. costs are based on southern region out-of-pocket unit costs. The cost study for the southern region was on the same basis as that for the eastern district.

The following are the out-of-pocket costs developed in these studies by respondents in transporting the traffic by rail;

	Total out-of-pocket costs	
	Including return on investment	Excluding return on investment
	(In cents per gross ton)	
P.C. & Y.-Pennsylvania costs based on eastern district Rail Form A (1961)	338.3	304.0
L. & N. costs based on southern region Rail Form A (1961)	145.2	128.0
Total	483.5	432.0

The respondents used the short routes of movement from Neville Island, Pa., to Duffs Junction or Scully, Pa., over the P. C. & Y. plus the movement beyond, over the Pennsylvania, to the latter's interchange point with the L. & N. at Cincinnati, Ohio. This movement involved 311 miles, 7 miles over P. C. & Y., and the remainder over the Pennsylvania.

The multiple-car shipment would be picked up at the interchange point by through train PMC-3 moving from Pitcairn Yard on the Pennsylvania to Columbus, Ohio. At Columbus it would be switched into train CIN-1 for movement to Cincinnati. From this point to Steelton, Ky., movement would be over the L. & N. for a distance of 220 miles. The entire movement would total 531 miles.

The respondents stated that, since the P. C. & Y. was a class II railroad, there was not available any cost data relative to its operation. For the 7-mile movement by that carrier from Neville Island to Duffs Junction, respondents used the origin terminal, way train, and interchange cost for the eastern district. Also, because this was a proposed movement it was not possible to develop any savings on the P. C. & Y. relative to billing costs and switching time; therefore, eastern district averages were used.

The movement from the interchange point at Scully to Cincinnati was costed on the basis of using the eastern district costs for the movement over the Pennsylvania.

As to switching operations, the respondents did not make any time study to the origination of a car but instead used the average eastern district switching minutes. They allowed 15.29 minutes each to place the empty car and remove the loaded car. These 15.29 minutes were, in turn, multiplied by 12 cars which totaled to 183.5 minutes. To place empties and remove loaded cars, the respondents, therefore, allowed 367 minutes. This operation was estimated to be 6 hours.

At the interchange point there were 7.65 minutes average per car for 12 cars. The interchange costs were increased for empty return movement; and the empty return ratio on gondola cars for the eastern district was used (74 percent). The respondents added 67.9 minutes

to handle the empties, and the total at the interchange point was given as 159.7 minutes.

For intertrain and intratrain switching, which respondents used at Columbus, the average per car was 4.59 minutes; this, in turn, was multiplied by 12 which resulted in 55.1 minutes. The above minutes were increased by the empty return ratio of 74 percent resulting in 95.9 minutes for switching at Columbus. This operation involved the handling from train PMC-3 to train CIN-1. Since the considered traffic was not moving in multiple cars, the respondents relied upon averages and these averages, they claim, overstated the movement.

Individual applications.—The respondents' other two cost studies were based on individual applications of Rail Form A for the Pennsylvania and the L. & N. for the year 1962. The individual application of Rail Form A formula for the Pennsylvania was developed for two purposes, one to show that the costs developed under Rail Form A are comparable to the eastern district costs with respect to the Pennsylvania costs; and secondly, as the respondents did not have available eastern district costs for the year 1962, the individual Rail Form A study was presented in substitution. Thus, the movement from the interchange point at Scully to Cincinnati was costed by applying cost factors developed under Rail Form A prepared for the Pennsylvania. Eastern district average origin terminal, way train, and interchange cost was applied for the move over the P. C. & Y.

The L. & N. also applied the individual application of Rail Form A formula for the year 1962. The purpose of its application is the same as that mentioned above for the Pennsylvania. The former also made adjustments of the interchange switching at Cincinnati (Decoursey Yard) with the Pennsylvania.

There was some doubt expressed by protestants regarding the switching at Decoursey Yard as to whether trains No. 75 and No. 158, used for this transportation beyond Cincinnati, were way trains or through trains, because some switching might be involved. This respondent stated that these trains are different from a way train or so-called local train in that they do no switching en route, while a local freight does. However, a through train may at certain points have a setoff of cars for business purposes but there is no switching involved. The L. & N. maintains that it should not take more than 25 minutes to set off cars at the Steelton plant.

The interchange switching at Cincinnati with the Pennsylvania was adjusted to reflect the cost resulting from this move. The cost per carload as shown by the L. & N. is $4.63. Also, intermediate switching at Louisville, Ky., has been adjusted to 40 percent of the average intermediate switching cost. This results in an intermediate switching cost of $2.69 per carload.

With respect to costs developed under the individual applications of Rail Form A formula for the Pennsylvania and the L. & N., the following is shown:

	Total out-of-pocket costs	
	Including return on investment	Excluding return on investment
	(In cents per gross ton)	
P.C. & Y. cost based on eastern district Rail Form A (1961); and Pennsylvania cost based on Pennsylvania Rail Form A (1962)	331.4	300.0
L. & N. cost based on L. & N. Rail Form A (1962)	137.5	119.0
Total	468.9	419.0

PROTESTANTS' RAIL COST STUDY

The protestants developed out-of-pocket and fully distributed costs applicable to movement of ingot molds in gondola cars, 112,000 pounds per car, 600 gross tons per shipment, from Neville Island to Steelton. These costs were based on territorial average costs utilizing Rail Carload Cost Scales by Territories for the Year 1961, Statement No. 5-63, prepared by the cost finding section.

The terminal costs were computed from table 3 of the above-mentioned statement and are the average of eastern district and southern region terminal costs for a gondola with a load of 50 tons and, in effect, assigned an eastern district origin cost, at Neville Island, and a southern region termination cost at Steelton.

The protestants used the docket No. 28300 mileage from Neville Island to Cincinnati increased 13 percent for circuity to encompass all the routes to Cincinnati. Eastern district unit costs were applied to the mileage. Further, the rate applies over the L. & N. beyond Cincinnati, and, therefore, the protestants apply southern region unit line-haul costs to the L. & N. mileage from that point to Steelton as shown in supplement 23, I.C.C. A-16622. The costs reflected the movements in way trains and through trains.

The total territorial interchange out-of-pocket costs per loaded car-mile and the constant cost per hundredweight mile were included in the respective line-haul costs. All unit costs per carload were divided by 50 gross tons, the number of gross tons in 112,000 pounds, the minimum weight per car for the $5.11 rate in the tariff. All unit costs shown in per hudred weight were multiplied by 22.4 to obtain unit cost per gross ton of 2,240 pounds.

A cost per gross ton of 5.6448 cents was included for loss and damage claim payments based on that shown for class 579 in appendix A, I.C.C. Statement No. 5-63.

The results of protestants' cost study for the traffic at issue indicate an out-of-pocket cost of 505.8 cents per gross ton and a fully distributed cost of 785.0 cents per gross ton.

Protestants also used respondents' 1961 eastern district and southern region costs to show average total cost (total operating expenses, return and recovery of passenger and less-than-carload deficits) allocated by Rail Form A, schedule G expense groups. The average total costs for the movement of ingot molds from Neville Island to Steelton using the method and operating factors employed by the rail respondents showed—

Movement (1)	Average total cost per gross ton (2)
	Cents
Within eastern district	475.0
Within southern region	212.9
Total	687.9

Water Costs

The Mississippi Valley Barge Line, hereinafter called the bargeline, introduced a cost study vased on Barge Form C. It was necessary, as stated by this protestant, to depart from Barge Form C in order to make several adjustments in the terminal areas at Pittsburgh, and in the unloading point at Owensboro, Ky., so as not to overstate costs on the actual movements involved in handling the traffic. The above is particularly true in respect to port service cost, i.e., tug and fleeting costs at origin and destination, which showed an average cost of $9.44 per loaded barge which represented the cost generally of maintaining and operating a fleeting area at Pittsburgh.

The bargeline did not complete its study of the cost of providing tug service at Pittsburgh. Instead, an anlysis was made of actual movements for the past 2 years and the actual costs incurred at Pittsburgh were noted after which an average cost was taken and included in port costs, as finally applied. The same approach was followed at Owensboro, Ky., and to the total average port cost, the cost per barge of maintaining a fleet at Pittsburgh was added to the average tug and fleeting cost. This protestant argues that the deviation in the matter of port service cost was proper when consideration was given to the fact that the Pittsburgh port area extended from Monaca, Pa. 24 miles below Pittsburgh to more than 100 miles north of Pittsburgh on the Monongahela River and 79 miles north of Pittsburgh on the Allegheny River. It states that the movement under study required tug movements of only 7 miles and contends that an anlysis of the actual tug expenses incurred would more accurately describe those costs than an average cost based on such a large port area as Pittsburgh.

Since all movements actually involved were made in line-haul barges and the actual time was noted in each barge's log, costs were computed at the particular barge's average hourly cost. This protestant did not maintain any fleeting area at Owensboro. Therefore, no cost of maintaining such was added as was done at Pittsburgh.

It is stated by the bargeline that the other departure from Barge Form C was in the application of barge costs to the actual movement. Computations were made to show the cost per day applicable to uncovered jumbo barges. These costs were based on calendar days due to the fact that in 1962 the protestant kept no record of so-called idle days. Consequently, there was shown the actual days that barges were utilized from the time of arrival at origin empty to date of departure with respect to the particular movement. In addition, it was shown that the

average empty en route time was 7.86 days. An average empty return ratio of 31.64 percent was applied on those days to provide an allocation of empty days en route associated to the particular movement. The empty return ratio on the lower Ohio River was calculated from the total empty miles of 33,916 to the total loaded miles of 98,950 and for the upper Ohio River the total empty miles of 6,535 to the total loaded miles of 28,883.

The bargeline showed a range in elapsed barge time, before application of empty return, of 14 days for barge MV-709 to 24 days for barge MV-744 and an overall average of 22.01 days.

The bargeline, in exhibit No. 24 (Barge Form C, corrected summary schedule, page 3, lines 27 through 39) showed the various cost elements applied to the study movement. Column (3) shows a cost based on operating expenses of $2.7993 per net ton and when expanded to reflect operating ratio of 87.9 percent (the average for the bargeline for the past 3 years) it amounted to $3.1846 per net ton. The latter figure was adjusted to $3.5668 per gross ton. It is stated that if the operating costs were increased to include return on investment at a rate of 4 percent for comparative purposes (the same rate generally used by railroads), the cost per net ton including return would be $3.0413 per net ton, instead of $2.7993, or $3.4059 per gross ton.

The bargeline shows that when the ancillary costs for transfer and trucking services at destination amounting to $1.79 per gross ton are included in the costs, the above figures become $5.3568 per gross ton on an operating ratio basis and $5.1959 per gross ton applying a return on investment of 4 percent.

Discussion of the Cost Evidence

We consider first the costs for rail movement.

In their statement No. 5-63 costs, respondents separated from the territorial line-haul costs the interchange switching and intertrain and intratrain switching and included these switchings as they occurred at Duffs Junction and Cincinnati. This procedure is acceptable, as Rail Form A provides for handling switching costs based on either: (1) actual known experience, or (2) on a mileage basis, when actual experience is not known.

Respondents' station clerical costs were not reduced to one-twelfth to reflect the fact that the shipment would be handled in 12-car multiple shipments.

Respondents' use of eastern district average through train weights is based on a 4- or 5-day study sufficiently representative of the proposed operations to be considered reasonably reliable. Similarly, for that portion of the traffic originating on and moving over the P. C. & Y., the respondents' use of the eastern district costs for origin terminal, way train, and interchange produces acceptable costs for that carrier.

Respondents' routing to Steelton of 531 miles was determined by using the actual distance over the P. C. & Y. to Duffs Junction of 7 miles, thence the Pennsylvania to Cincinnati of 304 miles, and then the L. & N. to destination of 220 miles. This routing, involving one actual interchange with no circuity added to the actual miles, is reasonable.

Protestants' rail cost study included 5.6448 cents per gross ton for loss and damage claim payments. This was the average for 1961 of some 20 different items, including iron, steel, and other metallic articles. The respondents in their cost computations did not include any item of

cost for this since the nature of the commodity involved makes unlikely the occurrence of loss and damage. Nor has the consignee experienced any loss or damage. In the circumstances, we agree with this omission.

The protestants made an adjustment in their costs for movements in 600-ton lots, a tariff requirement for the $5.11 rate, by dividing the station clerical expense by 12, the number of 50-gross-ton loaded cars in a 600-gross-ton movement.

Comparison of the respondents' and protestants' rail costs based on statement No. 5-63. (These costs include return on investment and allowance for Federal income taxes.)

	Rate	Out-of-pocket cost	Constant cost	Fully distributed cost
Respondents' exhibits Nos. 9 and 12 (excluding loss and damage)	511	483.5	275.9	759.4
Protestants' exhibit No. 5 (including loss and damage)	511	505.8	279.2	785.0

The respondents' out-of-pocket rail cost study in the eastern district is 14.8 cents more than protestants' out-of-pocket rail cost for the same district. The protestants' out-of-pocket rail cost study in the southern region is 31.4 cents more than the respondents' out-of-pocket rail cost for the same region. Thus, protestants' out-of-pocket rail cost study is 16.6 cents more than respondents'. This latter cost difference does not consider loss and damage costs. Respondents, as stated above, did not include a loss and damage cost in their study, whereas protestants included a cost of 5.6 cents per gross ton. Thus, adding the 5.6 cents to the 16.6 cents provides 22 cents, which

is the total difference between respondents' and protestants' out-of-pocket cost studies.

Protestants in their restatement of respondents' Statement 5-63 costs claim that respondents reduced their out-of-pocket switching costs in the southern region by 32.5 cents per gross ton based solely upon an operation described by an operating witness for respondents. According to protestants, the rail out-of-pocket cost restated to correct for this allegedly unwarranted adjustment in switching costs would be 516 cents per gross ton or 5 cents more than the proposed rate. The 516 cents is obtained by adding the 32.5 cents to respondents' cost of 483.5 cents per gross ton. Indeed, protestants' costs did not reflect any estimate of the reduction in costs (other than station clerical) for handling multiple-car shipments in heavier than average weight trains. However, cost reductions in such instances may be said to be axiomatic. *Asphalt to Iowa, Michigan, Minnesota, and Wisconsin*, 316 I.C.C. 117, 124. See also *Volume rates on Processed Meal—Midwest to Ports*, 322 I.C.C. 456, 485. Rail Form A computations recognize only to a limited degree reductions resulting from multiple-car shipments because applicable Rail Form A costs are based on average switching cost per car resulting from switching cuts of cars of various sizes.

Recent and pertinent cost experience of the past often furnishes an appropriate guide in judging rates for the future. However, if a carrier's costs per 100 pounds or other unit have been high because of low volume of traffic, the use of such costs to determine the reasonableness of a proposed rate, the very purpose of which is to increase a carrier's business, should of necessity be given careful consideration. For example, had the tonnage which a new rate is expected to produce been included in cost calculations the resulting costs would be much lower. Stated in another manner, in judging rates for the future reason-

able prognostications should be given weight. Here, respondents' expert operating witness testified that, in his opinion and on the basis of past experience, a reduction of switching costs would result from the proposed multiple-car movements. As indicated, cost reductions in such situations are axiomatic. Moreover, protestants' cost witness appeared to recognize the foregoing for, when asked if anything, in his opinion, would preclude an actual reduction of the costs resulting from multiple-car movements, he stated:

> No, sir. A study that would be made which would show the time elements for the various types of switching could be made, and it would adjust from the particular point at which the formula had actually developed cost.

In light of the foregoing and since the respondents' witness has not been successfully rebutted, we conclude that the reduction in switching costs would occur. We are convinced that it is more reasonable to recognize the reduction than to reject it.

As to the respondents' individual Rail Form A applications, apart from the aforementioned criticisms as to the territorial costs, protestants appear to find fault here only to the extent that the Pennsylvania did not show the system factors used in preparing its individual carrier costs. However, it appears of record that the respondents' working papers were submitted to the protestants and stood unchallenged at the hearing. In our opinion, the individual cost applications reflect reasonable adjustments appropriate in the circumstances for proposed movements, and stand unrebutted. We so find. While costs cannot be pinpointed here exactly, we conclude that the out-of-pocket costs for the proposed movement reasonably approximate those adduced by respondents by individual application; individual, more specific showings being preferable to territorial averages.

Intermodal cost comparisons

Cost level (1)	Respondents (2)	Protestants (3)	(4)
	(In cents per gross ton)		
1. Rail out-of-pocket costs:			
1. Territorial costs, statement No. 5-63, adjusted	[1]483.5	[2]505.8	[3]516.0
2. Individual Rail Form A Pennsylvania and L. & N.	[1]468.9		
2. Rail fully distributed costs:			
1. Territorial costs, statement No. 5-63, adjusted	759.4	[2]785.05	(a)759.4
3. Rail average total cost: (or "Full Cost")			(b)617.1 (c)687.9 (d)564.3
4. Barge costs: Average total		[4]519.6 [5]535.6	

[1] Includes movement of P.C. & Y at eastern district costs for 1961.

[2] This figure was computed and submitted by protestants (Waterways Freight Bureau).

[3] Respondents' territorial out-of-pocket costs (483.5 cents per gross ton) corrected by protestants to adjust for respondents' understatement of switching costs in the southern region; i.e., 32.5 cents (483.5 + 32.5 = 516).

[4] Includes the ancillary charge for transfer and trucking services at destination of 179.0 cents per gross ton plus an operating cost of 340.6 cents per gross ton which included a 4-percent return on investment after Federal income taxes. The latter figure (340.6 cents) is derived by applying return on investment ratios to the respective towboat, barge, and port service costs to arrive at a total cost of $2,119.93 per bargeload. This figure, in turn, is divided by the "load-per-barge factor" of 701.75 net tons (2,000 pounds) resulting in a cost of 3.0209 cents per net ton, to which is added the cargo loss and damage cost of 2.01 cents per ton and provides a cost of 3.0410 cents per net ton. The latter figure is then multiplied by the ratio of 1.12 to expand from cents per net ton to cents per

The above figures for items (a), (b), (c), and (d) represent the result of the protestants' four basic methods for determining "rail full cost." All calculations are based on respondents' territorial costs, statement No. 5-63 adjusted, from which respondents developed an out-of-pocket cost of 483.5 cents per gross ton. The following identifies the four methods:

(a) *Distribution of rail constant costs on basis of service units.*—This method uses the Rail Form A ton and ton-mile distribution of constant costs, which protestant determines to be 275.9 cents and added to respondents' out-of-pocket cost of 483.5 cents to provide the cost of 759.4 cents per gross ton.

(b) *Distribution of rail constant cost on basis of revenue need.*—This method increases the out-of-pocket costs (483.5 cents) by a "carload revenue need ration," determined separately for the eastern district and southern region by dividing the total sum of (1) gross freight revenue—carload, and (2) freight switching revenue (total out-of-pocket expense—carload minus Switching and Terminal Co. out-of-pocket expense and return). The resulting ratios are: eastern district, 1.209; southern region, 1.433. The calculations are:

	Out-of-pocket	Revenue need ratio	Total
	Cents		*Cents*
Eastern district	338.3	1.209	409.0
Southern region	145.2	1.433	208.1
Total	483.5	.....	617.1

gross ton, which produces an operating cost of 340.6 cents per gross ton.

[5] Includes barge costs of 279.93 cents per net ton (or 313.52 cents per gross ton) divided by an operating ratio of 87.9 which provides the figure of 356.68 plus 179 cents per gross ton for ancillary charge resulting in 535.68.

(c) *Average total cost including return on investment and operating deficits.*—Average total cost here consists of total operating expenses, rents, and taxes; 4 percent return on investment (100 percent of road and equipment), after Federal income taxes; and passenger and less-than-carload deficits (exhibit No. 35).

(d) *Average total cost including average revenue need.*—This method consists of rail total operating expenses, rents, and taxes (excluding Federal income taxes) increased by an "average revenue need," the latter revenue need being computed as the ratio of freight operating revenue to freight operating expenses, rents, and taxes (excluding Federal income taxes).

APPENDIX D

Served December 2, 1965

30300

INTERSTATE COMMERCE COMMISSION

Investigation and Suspension Docket No. 8038

INGOT MOLDS, PA., TO STEELTON, KY.

Decided November 9, 1965

On reconsideration, reduced multiple-car railroad rate on ingot molds, mold stools, and sprue plates from Neville Island and Pittsburgh, Pa., to Steelton, Ky., found unjust and unreasonable, and in contravention of the national transportation policy. Findings in prior report, 323 I.C.C. 758, reversed, schedules ordered canceled, and proceeding discontinued.

Appearances as shown in the prior report and, in addition, *Thomas M. Knebel* and *Bryce Rea, Jr.*, for intervener.

REPORT AND ORDER OF THE COMMISSION ON RECONSIDERATION

BROWN, *Commissioner:*

In the prior report, 323 I.C.C. 758, decided February 2, 1965, division 2 found just, reasonable, and otherwise

lawful the reduced railroad rate [1] of $5.11 on ingot molds, mold stools, and sprue plates, hereinafter called ingot molds, from Neville Island and Pittsburgh, Pa., to Steelton, Ky. Upon petition of the respondent railroads [2] and the protestant bargelines,[3] the proceeding was reopened by the Commission for reconsideration on the present record. The National Motor Freight Traffic Association, Inc., was permitted to intervene and file a reply to the respondents' petition.

These schedules became effective March 19, 1965. For convenience, however, the rate at issue will be called the proposed rate. The facts are adequately set forth in the prior report, and will be restated only where helpful for a clear understanding of the issues.

Since 1953, the movement of this traffic has been principally by barge-truck. The overall charge of $5.11 for movement by barge-truck consists of a barge rate of $3.32, minimum 600 gross tons, a barge-to-truck transfer charge of 95 cents at Owensboro, Ky., and a for-hire truck charge of 84 cents beyond. In 1953, the barge rate was $2.84, minimum 500 gross tons. That rate was subsequently increased to the present level and minimum, which were attained in November 1960.

Prior to the publication of the proposed rate, rail shipments were limited to instances of special orders for ingot molds required by the receiver's production schedules. According to consignee testimony, railroads cannot effectively participate in the movement, unless their rate

[1] Rates, costs, charges, and differences therein are stated per gross ton, unless otherwise indicated.

[2] The Pennsylvania Railroad Company (the Pennsylvania) and the Louisville and Nashville Railroad Company (the L. & N.).

[3] Mississippi Valley Barge Line Company (Mississippi), The Ohio River Company (Ohio), and Union Barge Line Corporation (Union).

would not exceed the total cost to the consignee of barge-truck service. As noted above, that cost is $5.11. The present rail rate is $11.86,[4] subject to a carload minimum of 100,000 pounds. The proposal applies to a minimum of 600 gross tons in single shipments, minimum 112,000 pounds per car, on one bill of lading from one consignor at one origin to one consignee at one destination, tendered in one day.

In approving the rate, division 2, noted that—

> * * * protestant bargelines have chosen for some time to forego the revenues of a rate set at a level which would return fully distributed costs. They have done so voluntarily and, considering the rail rate levels and the fact that the traffic has moved almost exclusively by barge since 1953, without being subject to any competitive compulsion insofar as respondents are concerned. * * * From all that appears of record, protestants' choice in setting their rate at the level respondents now seek merely to meet was also reached voluntarily. Such action affords no basis for assuming that the action of respondents in meeting but not undercutting protestants' rate destroys an inherent cost advantage. Indeed, we think it plain that protestants, being in a position of their own free choosing, cannot successfully object to a rate which, we find, will return revenues reasonably in excess of out-of-pocket costs * * *. [323 I.C.C. 758, 763.]

Division 2 then concluded that the rate was compensatory and just and reasonable and not a destructive competitive practice in derogation of the national transportation policy.

The respondents, in their petition for reconsideration, request that division 2's report be modified. They urge

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[4] Conversion to a gross-ton basis of the rate of $10.59 published per net ton, effective in February 1963.

the elimination of a policy statement to the effect that fully distributed costs are adhered to by the Commission in determining the low-cost mode. It is respondents' position that only out-of-pocket (incremental) costs of the proponent carrier should be considered, and that a rate which exceeds such costs is lawful. In their view no reliable intermodal cost comparison can be made and none should be attempted. The protestants, however, argue that intermodal cost comparisons should be made and that those compared should be on the full-cost level.

In their petition, the protestant bargelines argue that the report of division 2 is contrary to the legislative history of section 15a(3) of the Interstate Commerce Act, and cannot be reconciled with any reasonable theory of destructive competition, as reflected in the national transportation policy.

No serious dispute is raised on petition as to the analysis of the cost evidence in the prior report. We adopt such statements therein as our own. The proposed rate exceeds the rail respondents' out-of-pocket cost of 468.9 cents by 42.1 cents. The rail fully distributed cost is 759.4 cents, and the comparable full cost for barge-truck service is 519.6 [5] cents. The proposed rate, which is on parity with the total charges for barge-truck service, is below the rail fully distributed cost by 248.4 cents and below the barge-truck full cost by 8.6 cents.

The protestants contend that the costs of Mississippi are typical of the costs of all barge protestants herein since the cost factors for the different carrier lines are very similar. Mississippi handled 10 of the 19 shipments in the period 1961-63, and we accept the cost figures from its data as representative for our purposes herein.

[5] Includes barge full costs of 340.6 cents, plus the barge-to-truck transfer charge of 95 cents and the for-hire truck charge of 84 cents.

The costs of providing additional services attending the movement of traffic by barge are not shown on this record. Division 2, relying on the Commission's findings in *Sugar, South to Indiana, Ohio River, Intermediate Points*, 319 I.C.C. 782, 784, added the aggregate of such charges to the barge costs in computing the full cost of barge-truck service herein. Under the circumstances here present, we accept the division's computation of barge-truck costs.

Division 2 further concluded that other service considerations of the competing modes were not shown of record to be controlling. We agree that in this context neither mode possesses any material inherent service advantage.

Discussion and Conclusions

Simply stated, the railroads are here proposing a rate of $5.11, that meets the charges, $5.11, to the shipper who utilizes barge-truck. The rail rate is below its fully distributed costs of $7.59. The barge-truck charges are below its fully distributed costs of 519.6 cents but, as noted, the barge-truck fully distributed costs are considerably lower than those of the railroads. Under equal charges, rail respondents virtually concede that all of the traffic would move by rail.

Section 15a(3) of the act provides that—

> In a proceeding involving competition between carriers of different modes of transportation subject to this Act, the Commission, in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by the carrier or carriers to which the rate is applicable. Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of

the national transportation policy declared in this Act.

As pertinent here, the national transportation policy provides for—

> * * * fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each * * * to promote * * * and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without * * * unfair or destructive competitive practices; * * *.

In *Interstate Commerce Commission* v. *New York, N. H. & H. R. Co.*, 372 U.S. 744, 762 (1963), the Supreme Court observed that—

> The primary reason for the reference to the National Transportation Policy in § 15a(3) was to confirm the Commission's power to protect the inherent advantages of all carriers from destructive competition.

Cost is such an advantage. *Interstate Commerce Commission* v. *New York, N. H. & H. R. Co., supra*, 759.

The importance of this case rests upon the resolve of a fundamental proposition: the criteria for determining how the low-cost carrier's inherent advantages should be measured and protected. Such a determination comprehends a comparison of the cost advantages of two competing modes of carriage. It could not be determined, *in vacuo*, by viewing the operations of a single carrier or mode, as urged by the respondents.

In *Grain in Multiple-Car Shipments—River Crossings to So.*, 325 I.C.C. 752, 772, the Commission recognized that—

> Although the fully distributed cost standard requires an arbitrary assignment of constant costs to

particular traffic, that standard has generally been employed in measuring inherent cost advantages in intermodal competitive rate controversies.

In the prior report, division 2, concluded that—

> * * * whenever [regulated] competitive carriers of different modes assert cost advantages inherent to their respective modes, * * * [the Commission has] recognized in fully distributed costs the only sound standard of measurement reflecting as many attributable constant costs as it is reasonably practicable to apportion. [323 I.C.C. 758, 762.]

We agree. The rail respondents, however, argue against the use of such standard. On reply to protestants' petition for reconsideration respondents urge that—

> * * * a rate is "profitable" if it produces revenues in excess of the incremental [out-of-pocket] costs of providing the service. And a rate achieves maximum profits when the revenues per unit above the incremental cost of producing the unit, multiplied by the units sold reaches the optimum. This in turn depends upon the demand for the service at varying price levels. The optimum price being a function of the varying demand at different price levels, it follows that it may be relatively close to the incremental cost level or considerably above it. But if the price is optimum, regardless of its relationship to a fully distributed cost level determined by a statistical allocation of the constant expenses, it will make the maximum contribution to the pricer's net. * * * the optimum price oriented to the incremental cost as the floor is "fully compensatory" for no other price can produce as great a contribution. Thus, a fully compensatory rate is one which produces the maximum contribution; and for it to be achieved, the only relevant cost level is incremental cost. Within a multiservice industry, it will only be a coincidence, something equivalent to receiving 13 cards of one suit in a bridge hand, where the fully

compensatory rate—if this means the rate producing the maximum profit—happens to equal a statistically determined "fully distributed" costs.

* * * So far as the volume movement of ingot molds is concerned, the single car rate of $11.86 per ton, which existed prior to the reduced rate and still is available, has produced no traffic. While it exceeds the fully distributed cost level, it produces no net with respect to the volume movement of this traffic. Viewed from the railroads' standpoint, it is a "non-compensatory" rate since it generates no profits. By contrast, the reduced multiple car rate of $5.11 per ton will generate a considerable movement of the volume tonnage. If the shipper is to be believed, and the railroads believe him—and the Commission has no reason for doing otherwise—the rail rate must be at this level or lower if the railroads are to haul any of the volume movement. This reduced rate, which amply covers the incremental costs but falls short of the artificial fully distributed level, is therefore not only a profitable rate, but actually the most profitable rate the railroads can charge on this traffic. It is also, therefore, a "fully-compensatory" rate since no other rate would produce as much net.

We do not agree with respondents' arguments that fully distributed costs are an inappropriate or inadequate measure of the inherent cost advantages of competing regulated carriers. That is not to say that fully distributed costs should set the floor for transportation prices. In the setting of particular rates, as where competition from unregulated carriers compels, a carrier should be allowed to set its rates below fully distributed costs. However, merely because a carrier is able, without incurring an out-of-pocket loss, to handle certain traffic at rates below fully distributed costs, and perhaps by diverting sufficient tonnage from its regulated competitors to maximize thereby the contribution that such traffic would make to its overhead, does not necessarily mean that the

carrier is the more efficient of the two. Carriers, such as the railroad respondents, do not, in the circumstances here present, possess an inherent cost advantage within the context of the national transportation policy which the Commission is obligated to recognize and preserve.

Moreover, regulation could neither be fair nor impartial if we did not recognize the fact that the carriers before us do not compete for every type of traffic. It is quite obvious, for example, that the traffic here involved is of far more consequence to the barges than to the railroads. Analysis of 1962 systemwide revenues for the Waterways Freight Bureau's members indicates that iron and steel products, which includes ingot molds, is the third most important commodity group transported in barge service, accounting for 10.81 percent of their total revenue. It is 1 of 11 commodity groups which account for 81.45 percent of the total barge revenue. In fact, the railroads readily concede this point. In short, an inherent cost advantage under the national transportation policy reasonably could not embrace a concept that would impair the ability of a carrier not only to compete but to exist.

In the prior report division 2 concluded that—

> It may readily be inferred that protestants would have raised their rate to a higher level * * * had they themselves deemed it appropriate to protect their inherent advantage. * * * protestants' cost advantage is such that they are in a position to continue to compete effectively and still charge a [reasonable] rate * * *. [323 I.C.C. 758, 764.]

We disagree. To have any validity the concept of an inherent cost advantage must have a definitive meaning. It could not, therefore, be framed within such a relative context, as suggested in the prior report. Either one mode or the other possesses an inherent cost advantage, and

that advantage is not subject to the sport of chance. That is to say, such an advantage cannot be lost merely by the creation, accidental or otherwise, of a rate below a fully distributed cost level. It appears so obvious here, for example, that the barge protestants were not aware of the precise cost level when their present rate was set.

In *Pig Iron, Buffalo, N. Y., to Chicago, Ill., and Gary, Ind.*, 321 I.C.C. 121, 129-130, the Commission, division 2, concluded that—

> * * * the principal purpose of the reference in section 15a(3) to the national transportation policy was to prevent a carrier from setting a rate which would impair or destroy the inherent advantages of a competing carrier, for example, by setting a rate, below its own fully distributed costs, which would force a competitor with a cost advantage on particular transportation to establish an unprofitable rate in order to attract traffic. It is readily apparent that if the reduced rates are approved from the five origins where protestant * * * [barge lines are] the low-cost carrier, any reductions in the water carrier rates necessitated thereby would necessarily be brought to a level below fully distributed cost. Therefore, the reduced rail rates result in a destructive competitive practice in contravention of the national transportation policy since the rates are substantially below the respondents' fully distributed costs and will force the protestant, which has a cost advantage, to establish unprofitable rates in order to remain competitive. This, in turn, would impair or destroy the protestant's inherent cost advantage.

As pointed out in *Interstate Commerce Commission* v. *New York, N. H. & H. R. Co.*, *supra*, 757,

> There can be no doubt that the purpose of this provision [§ 15a(3)] was to permit the railroads to respond to competition by asserting whatever inherent advantages of cost and service they possessed.

In circumstances such as here presented where both the proponent carrier and the competing carrier are regulated, the Commission consistently has utilized the fully distributed cost standard to determine which mode of carriage possesses an inherent cost advantage. *Electric Cable & Wire, Worcester, Mass., to Houston, Tex.*, 319 I.C.C. 390; *Plastics from Texas to the East*, 319 I.C.C. 379; *Frozen Juice and Fruit from Florida to the North*, 319 I.C.C. 577; and *Candy and Confectionery from N. J., N. Y., & Pa. to Tex.*, 321 I.C.C. 154. Under that standard the rail respondents here do not possess an inherent cost advantage.

The propriety of using the fully distributed cost standard and questions respecting the proper construction of costs for the various modes are among the issues in the broad rulemaking proceeding of docket No. 34013, Rules Governing the Assembling and Presenting of Cost Evidence. A radical departure from the fully distributed cost norm as urged by the respondents would not be justified on the limited record here before us, particularly when such issues are to be determined on a comprehensive record in docket No. 34013.

The Supreme Court emphasized in *Interstate Commerce Commission* v. *New York, N. H. & H. R. Co.*, *supra*, that—

> The principal reason for this reference [in § 15a(3) to the national transportation policy], as the hearings show, was to emphasize the power of the Commission to prevent the railroads from destroying or impairing the inherent advantages of other modes. And the precise example given to the Senate Committee, which led to the language adopted, was a case in which the railroads, by establishing on a part of their operations a compensatory rate below their fully distributed cost, forced a smaller competing *lower cost* mode to go below its own fully distributed

cost and thus perhaps to go out of business. [372 U.S., 744, 758.]

On a fully distributed basis, the low-cost mode of transport is barge-truck. We do not agree with division 2's conclusion that the barge "cost advantage is such that * * * [those carriers] are in a position to continue to compete effectively and still charge a rate reasonably in excess of out-of-pocket costs, * * * even if they were to reduce their rates." 323 I.C.C. 758, 764.

Nothing in that report suggests that such a reduction in the rate of the barge-motor lines cannot be matched by successive reductions in the railroad rates. The railroad out-of-pocket costs are lower than the barge-motor lines' variable costs. Therefore, the railroads can wage the rate battle as long as or longer than the barge-motor lines. The rationale of the division's report would permit no ground upon which the Commission would be able to intercede to halt such a devastating rate war. While this may give full rein to the "play of competition," 323 I.C.C. 758, 764, it is difficult, if not impossible, to comprehend how it would accord recognition and preservation of inherent advantages as contemplated by the national transportation policy.

In short, by reducing its rate below the level of the barge-truck full costs, the respondent railroads have unlawfully impinged upon the ability of the barge-truck mode competitively to assert its inherent cost advantage. This action we cannot approve. To hold otherwise we would deprive barges from asserting an inherent cost advantage and we would deprive shippers of cheaper water transportation. Cf. *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567, 575-579 (1947); *Dixie Carriers, Inc.* v. *United States*, 351 U.S. 56 (1956).

Upon reconsideration, we find the reduced multiple-car rate, minimum 600 gross tons per shipment, on ingot

molds from Neville Island and Pittsburgh, Pa., to Steelton, Ky., unjust and unreasonable, and in contravention of the national transportation policy. The findings in the prior report are reversed.

VICE CHAIRMAN BUSH, dissenting:

Carrier initiated ratemaking innovations, compatible with the requirements of law and practical factors such as numerous and varied present day operational and technological advancements by those subject to rate regulation by us, do not warrant disapproval by administrative fiat. The finding of unlawfulness herein rests, in my view of the record, solely upon an adverse concept, which is contrary to the provisions of the Interstate Commerce Act, as well as Commission and judicial precedent of long standing.

Conspicuous by its *absence* is an important element of proof of the lawfulness of the proposal, particularly in an intermodal rate adjustment, namely: the unrebutted evidence of a competitive necessity, which has been affirmatively shown of record by respondents. Under the facts here presented, I can find no justification for ignoring this essential ratemaking factor of longstanding precedent in making such a determination herein.

Conspicuous by its *presence*, however, is a purely speculative and unprecedented theory wholly without evidentiary support nor cogent supporting reasons, relative to the manner in which cost concepts are applied, allegedly to justify disapproval of the proposal. The determination of the compensatory nature of any rate proposal and of the necessity that it comport with the rule of ratemaking set forth in section 15a of the act, as amended, requires a comparison of like with like factors, rather than the comparison of data incompatible with each other. Admittedly, the involved rail and barge-truck rates are be-

low the fully distributed cost level for the respective modes as is determined herein. Appropriate consideration is then given to a comparison of the proposed rail rate with those costs incurred by the *rail proponents* in accord with our longstanding practice as recognized by all modes of regulated transport. Then, in circumvention of reality and by adoption of a concept of first impression, the determination rests upon the foregoing cost comparison with the barge-truck costs to the *shipper*, rather than costs of the barge-truck movement to such carriers, to prove they possess the inherent advantage of being the low-cost mode of transport. A realistic evaluation indicative of the falsity of such a costing concept for carrier transportation is self evident, for what it costs the shipper to move its traffic are the *rates* of the carrier plus any other additional shipper incurred expense; yet costs to the carrier, in the absence of unusual circumstances not here present, do not constitute the rate paid by the shipper. Were it otherwise, the inherent carrier cost advantage would not be susceptible of reasonable precision but would be a relative concept, determinable solely by presentation of expenses of unregulated noncarriers. Such is not contemplated by any provision of the act nor judicial requirement.

Finally, although it is incumbent upon us to recognize and preserve the inherent advantages, of which cost is only one, possessed by any rate-regulated mode as contemplated by the national transportation policy, it is not within our province to remain oblivious to the bargeline protestants' evidence of their inherent disadvantages due to *inferior service*. Such an admission against interest militates against the finding herein that neither mode possesses any material inherent service advantage, and adequately supports the conclusion that such is inherent in rail service.

Upon consideration of the record in its entirety, I would therefore find the proposal just, reasonable, and otherwise lawful and discontinue the proceeding.

COMMISSIONER FREAS, dissenting:

In *Interstate Commerce Commission* v. *New York, N. H. & H. R. Co., supra,* called *New Haven,* the Supreme Court indicated that "hard competition" was contemplated by section 15a(3), and that we were no longer to be "a giant handicapper." Yet, the majority now holds that a carrier with an inherent cost advantage must, nevertheless, be protected against another carrier which has not been a competitive factor heretofore and which seeks only to meet the going rate on a compensatory basis. If the instant holding reflects any reasoned consideration of "hard competition," it will surely come as a surprise to the successful proponents of both section 15a(3) and *New Haven.*

Moreover, the protection [6] would utilize fully distributed costs to set the rate level. It is one thing to utilize the fully distributed formula to determine the existence of an "inherent advantage" as between unlikes; it is quite another to use it as a pricing floor. In light of the arbitrary aspects [7] of fully distributed costs, I find it hard to square the majority's cavalier acceptance of those costs as a pricing floor with more relaxed and, to an extent, incremental, standards of other formulas. See, e.g., *Animal Feed from Kansas City, Mo., to Chicago,* 325 I.C.C. 147, *Carbon Blacks from the Southwest to Ind., Ohio & Mo.,* 325 I.C.C. 138, and *Aluminum Extrusions from Miami to Chicago,* 325 I.C.C. 188, and the approval given

[6] "Insulation" would be a more apt term.

[7] Including the failure to give effect to public costs. See *Grain in Multiple-Car Shipments—River Crossings to So.,* 318 I.C.C. 641, 682-683, 321 I.C.C. 582, 618-621 (dissenting opinion).

therein to significant departures from past costing practices, the pendency of docket No. 34013 notwithstanding. In essence, the majority's approach is nothing more than a return to the arbitrary percentage differentials struck down in *New Haven*. It is worthy to note, however, that as to a comparable proposal on a substantially similar movement the proponents thereof ultimately prevailed in court. *Pig Iron from Neville Island, Pa., to Louisville, Ky.*, 313 I.C.C. 771 (1961), reversed in *Pennsylvania R. Co.* v. *United States*, 202 F. Supp. 584 (E.D. Pa. 1962).

As I see it, the majority has come full circle to the pre-section 15a(3) days before 1958, and is once again indulging in the arbitrary allocating of traffic among the various modes. It has done so by equating, in effect, fully distributed costs with a profitable rate. However, the protestants, for whatever reason and certainly not because of rail competition, do not realize such costs. In the circumstances, it must be presumed that ingot mold traffic has returned satisfactory profits. Therefore, it is appropriate to ask what, in actual effect, is being protected since as a fact of competitive economic life protestants' advantage has been a mere cipher. Nor can I indulge in the majority's venture into speculation as to the danger to protestants' survival due to the possible loss of this specific traffic. In actuality, it forms a very small segment of protestants' tonnage and revenue. The majority's logic dictates, if the water carriers' interests are to be protected, a raising of their rate and indeed those of all carriers generally to the fully distributed level. Yet, such an approach has never been taken, nor is it readily apparent why this particular area of rate-making should necessarily be singled out for the restrictive embrace of price fixing at a high level. The majority by its own admission refuses to impose it elsewhere, presumably even where unregulated water carriage is involved.

It is indeed unfortunate that the majority has chosen to limit its ratemaking considerations to the inflexible framing of the issues by the parties.[8] One can understand the narrow position taken by the parties for, if fully distributed costs are to set the rate level, the water carriers need rarely fear rail competition. Conversely, if incremental or out-of-pocket costs both measure inherent advantage and set the rate level, relatively few rail reductions would merit disapproval. But ratemaking is not, and cannot be, limited by application of an inflexible mechanical formula. Once it is determined which mode has the low-cost advantage, the effect of a proposed rate must be measured in that light. To limit a proposed reduction in rate to the fully distributed level of another mode, regardless of the level of the other mode's rate or of other transportation circumstances, is patently anticompetitive. It must be determined whether there is room for reasonable competition. The writer so testified on behalf of the Commission in hearings which ultimately culminated in the passage of section 15a(3). See e.g., Hearings Before the Subcommittee on Surface Transportation of the Senate Committee on Interstate and Foreign Commerce on Problems of the Railroad, 85th Cong., 2d sess., pt. 3, at 1884 *passim* (1958). As I understand matters, the Congress nevertheless determined to avoid what is considered to be past inconsistencies by writing a specific provision eliminating some of the supposed previously existing paternalism imposed under section 15a (2). Such action was taken despite the existing requirement in section 15a(2) that consideration be given to the need, in the public interest, of adequate and efficient rail

[8] Such an approach does not, in my opinion, reflect the full consideration of the choice which must be made between different remedies with different consequences to the carriers and the public. *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 167-168. See also *Gilbertville Trucking Co.* v. *United States*, 371 U.S. 115, 130-131; *New Haven*, 372 U.S. 744, 763; *Atchison, T. & S. F. Ry. Co.* v. *United States*, 225 F. Supp. 584, 606-607 (D. Colo. 1964).

service at the lowest cost consistent with the furnishing of such service.

Section 15a(3) directs us to consider the facts and circumstances attending the movement of the traffic. If there is room for reasonable competition, then a rate may be approved since the inherent advantage of the low cost of the competing mode will still be preserved. That is, the low-cost mode will still be able to compete. *Accord; New Haven*, 372 U.S. 744, 761, n. 14. Here, the proposed rate meets, not undercuts, the water-truck rate and reasonably exceeds out-of-pocket costs in the circumstances presented. Yet, the water-truck rate can still be competitively reduced if such action proves necessary, despite shipper testimony to the contrary, to participate in the traffic.[9] Indeed, such a reduction, even a small one, would in all likelihood, recapture the traffic since any subsequent rail reduction would probably be noncompensatory. Such a conclusion is evident from a comparison on a hundredweight basis of the rail costs accepted as valid with the rail rate. The water-truck movement, on the other hand, would have lower variable costs if the 90-percent variable figure recently referred to in *Grain in Mutiple-Car Shipments—River Crossings to So.*, 325 I.C.C. 752, 774, n. 11 (1965), for example, is controlling. The statement in the report that the railroad out-of-pocket costs are lower than the barge-motor variable costs is presumably the result of accepting uncritically a variability figure approximating 100 percent for protestants; a figure not conceded by protestants and rightly so since it assumes that equipment is being put to full use all of the time, a millennium few carriers have reached. Apart from the foregoing weakness in the majority's approach,

[9] It should be observed that the conclusion that a reduction by protestants would be necessary to participate plainly implies a service advantage on the part of respondents at equal rates; an advantage which should not go unrecognized.

even a 90-percent figure should no doubt be lower if it is assumed, as it can be, that the truck costs erroneously equated [10] by the majority with the truck charge are, in fact, less than the latter.

Preserving an inherent advantage does not, in my opinion, mean rate stratification. *New Haven*, when read in its proper context,[11] and the legislative history stand for no such principle. The division report reached the correct result on both realistic economic and legal grounds, and, in so doing, properly accommodated the different views of the parties. I would affirm the findings in the report.

I can appreciate a quest for certainty in decision-making but there are no absolutes in the pragmatic, competitive world of ratemaking. By refusing to recognize legitimate commercial objectives, I believe the majority's action invites both reversal in court and legislative action. I am unwilling to assume that the underlying congressional efforts were for nought.

COMMISSIONER TIERNEY, dissenting:

I would affirm the findings in the prior report that the proposed rate is just and reasonable, and not destructively competitive.

The rate maintained by protestant bargelines and at which they transported the traffic over a period of years was not set at that particular level for any competitive reason. Under the circumstances we must assume that such rate was at a profitable level. Therefore, the fully distributed cost level cannot, in this situation, be said to

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[10] See *Eastern Central Motor Carriers Assn.* v. *United States*, 239 F. Supp. 591 (D.D.C. 1965).

[11] Similarly, a proper reading of the *Pig Iron* case, 321 I.C.C. 121, cited by the majority, will disclose that the proponents there sought to undercut substantially, not merely to meet, the low-cost mode. I submit that the distinction is material.

represent the lowest profitable level since the water carriers were apparently conducting profitable operations (in the absence of competitive rates) at a rate below their full cost of service. Cf. *Interstate Commerce Commission* v. *New York, N. H. & H. R. Co.*, 372 U.S. 744, 759-761 (1963).

In a proceeding of this nature, the proponent of the rate must show (1) its costs, (2) that the proposal is just and reasonable from the standpoint of its own revenue requirements, and (3) that the proposal is not destructively competitive; and the party asserting that it has the inherent cost advantage must rebut the foregoing by showing *(a)* its costs, *(b)* the lowest level at which it may conduct competitive operations and continue to operate at a profit, and *(c)* the asserted differential, if one is necessary, for participation in the involved traffic. Here, the rails, in my opinion, have met their *prima facie* burden with evidence that the rate is just and reasonable and not destructively competitive; and the water carriers have not sufficiently rebutted such evidence. Accordingly, I would allow the public to receive the benefit of hard competition in the situation before us.

While the water carriers are the low-cost mode, there is no way to determine on the evidence of this record the lowest level at which they can effectively compete and continue to operate at a profit. Although the shipper testified of his intent to divide the traffic between the two modes, the respondents and protestants are in virtual agreement that at equal charges the shipper will tender all of the traffic to the rails. Under these circumstances, protestants were remiss in not furnishing us with the above-specified evidence.

The majority's action herein, utilizing arbitrarily the fully distributed cost level of the low-cost mode as a floor below which the high-cost mode cannot go in establishing

a competitive rate on a compensatory basis, in my opinion, is contrary to the legislative history of section 15a (3).

It is ordered, That the respondents herein be, and they are hereby, notified and required to cancel the schedules described in the order entered by the Commission's Board of Suspension on November 27, 1963, on or before January 3, 1966, upon not less than one day's notice to this Commission and to the general public by filing and posting in the manner prescribed under section 6 of the Interstate Commerce Act, and that this proceeding be, and it is hereby, discontinued.

By the Commission.

H. NEIL GARSON
Secretary

(SEAL)

APPENDIX E

I. NATIONAL TRANSPORTATION POLICY

(September 18, 1940.) (49 U.S.C., preceding §§ 1, 301, 901, and 1001.) It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of the Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

II. RULE OF RATE MAKING

Sec. 15a. (February 28, 1920; amended, June 16, 1933, September 18, 1940, August 12, 1958.) (49 U.S.C. § 15a).

(3) In a proceeding involving competition between carriers of different modes of transportation subject to this Act, the Commission, in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by the carrier or carriers to which the rate is

applicable. Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act.